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OLD DICTIONARIES AND NEW TEXTUALISTS

*Rickie Sonpal**

INTRODUCTION

In *United States v. Lopez*,[1] the Supreme Court held unconstitutional a federal statute because it exceeded Congress's power under the Commerce Clause.[2] Justice Thomas filed a concurring opinion urging the Court to further "temper [its] Commerce Clause jurisprudence in a manner that . . . is more faithful to the original understanding of that Clause."[3] Central to Thomas's conception of the original understanding of the Commerce Clause was what he perceived to be the former understanding of the word "commerce."[4] The meaning of "commerce," he argued, has changed since the framing.[5] According to Thomas, when the Constitution was ratified, "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes";[6] it did not include "productive activities" like manufacture and agriculture.[7] As the primary support for this definition, Thomas quotated from three dictionaries contemporary with the Constitution: a 1773 edition of Samuel Johnson's *A Dictionary of the English Language*, a 1789 edition of Nathaniel Bailey's *An Universal Etymological English Dictionary*, and a 1796 edition of Thomas Sheridan's *A Complete Dictionary of the English Language*.[8] Thomas rested his concurrence on the definition of "commerce" that he extracted from these dictionaries.

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1. 514 U.S. 549 (1995).
2. *See id.*
3. *Id.* at 584 (Thomas, J., concurring).
4. *Id.* at 586 (Thomas, J., concurring).
5. *Id.* at 587 (Thomas, J., concurring).
6. *Id.* at 585 (Thomas, J., concurring).
7. *Id.* at 586 (Thomas, J., concurring).
8. *See id.* at 585-86 (Thomas, J., concurring). From Johnson's definition of "commerce," Thomas quoted "Intercour[s]e [sic]; exchange of one thing for another; interchange of any thing; trade; traffick"; from Bailey, "trade or traffic"; and from Sheridan, "Exchange of one thing for another; trade, traffick." *Id.* at 586 (Thomas, J., concurring). Thomas bolstered these dictionary definitions with a few carefully chosen quotations and, bizarrely, the etymology of the word "commerce." *Id.* (Thomas, J., concurring).

Thomas's definition of "commerce" has not failed to elicit response. Herbert Hovenkamp, for one, challenges that definition.[9] Working within Thomas's "particular methodology of constitutional interpretation,"[10] Hovenkamp finds a different meaning of "commerce."[11] Hovenkamp contends that the meaning of "commerce," as understood at the time of the framing, was "far broader" than Thomas accepted "and included manufacturing and economic activity generally."[12] Hovenkamp supports this broader definition of "commerce" with contemporary usage of Adam Smith, Alexander Hamilton, and the framers.[13] According to Hovenkamp, these men used the word "commerce" in ways irreconcilable with Thomas's narrow definition.[14] Hovenkamp also provides his own definition from an old dictionary—he quotes Noah Webster's 1828 *An American Dictionary of the English Language*.[15] Hovenkamp's definition, derived according to the same methodology as Thomas's, does not support Thomas's conclusion. Hovenkamp's broader definition accordingly grants Congress broader power than Thomas's does.

Both Thomas and Hovenkamp seek to determine how the word "commerce" was understood at the time of the framing. Working within the same methodological framework, the two reach contrary understandings of the word. The only differences in their analyses lie in their sources. Whereas Thomas based his conception of the contemporary understanding of the word primarily on contemporary dictionary definitions, Hovenkamp supports his definition with a broader sampling of usages. The difference in results is significant: were Thomas to accept Hovenkamp's definition of "commerce," his concurring opinion would lose its force, and he would have to allow Congress broader powers under the Commerce Clause.

As the nation's body of law ages, parts of it become increasingly foreign to the modern reader. This alienation is due in part to the inevitable changes of language, particularly to the change of the meanings of words. Those judges who consider the original understanding of a statute binding require some tool to assist them in understanding how the statute and the words it comprises would have been understood at the time the statute was enacted. For such a tool, judges often turn to dictionaries contemporary with the statute,

9. Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 Colum. L. Rev. 2213, 2227-36 (1996).

10. *Id.* at 2229.

11. *Id.* at 2230.

12. *Id.*

13. *Id.* at 2229-30.

14. *Id.*

15. *Id.* at 2229. Webster defined "commerce" as "intercourse between individuals; interchange of work, business." *Id.*

trusting the dictionary to offer a clear and convenient snapshot of the meanings a word may have borne at the time the statute was enacted.[16]

16. *See* Eldred v. Ashcroft, 123 S. Ct. 769, 778 (2003); *id.* at 804 (Breyer, J., dissenting); Utah v. Evans, 122 S. Ct. 2191, 2205 (2002); *id.* at 2214 (Thomas, J., concurring in part and dissenting in part); J.E.M. Agric. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 146 (2001) (Scalia, J., concurring); INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting); Kyllo v. United States, 533 U.S. 27, 33 n.1 (2001); Atwater v. City of Lago Vista, 532 U.S. 318, 332 (2001); United States v. Hubbell, 530 U.S. 27, 50-51 (2000) (Thomas, J., concurring); Beck v. Prupis, 529 U.S. 494, 504 (2000); AMOCO Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 874-76 (1999); Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring in part); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 595 (1998) (Scalia, J., concurring); United States v. Bajakajian, 524 U.S. 321, 335 (1998); Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace and Agric. Implement Workers of Am., 523 U.S. 653, 656-57 (1998); Almendarez-Torres v. United States, 523 U.S. 224, 264 (1998) (Scalia, J., dissenting); Brogan v. United States, 522 U.S. 398, 400-01 (1998); Foster v. Love, 522 U.S. 67, 71 (1997); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 637-38 (1997) (Thomas, J., dissenting); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 745-46 (1996); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 857-58 (1995) (Thomas, J., dissenting); Hubbard v. United States, 514 U.S. 695, 700 (1995); United States v. Lopez, 514 U.S. 549, 585-87 (1995) (Thomas, J., concurring); Gustafson v. Alloyd Co., 513 U.S. 561, 575-76 (1995); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 227-28 (1994); Farmer v. Brennan, 511 U.S. 825, 854-55 (1994) (Blackmun, J., concurring); *id.* at 859 (Thomas, J., concurring); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 781, 801 (1993); Austin v. United States, 509 U.S. 602, 614 n.7 (1993); Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting); Nixon v. United States, 506 U.S. 224, 229-32 (1993); Rowland v. Cal. Men's Colony, 506 U.S. 194, 199, 203 (1993); Mississippi v. Louisiana, 506 U.S. 73, 77-78 (1992); Molzof v. United States, 502 U.S. 301, 307 (1992); Freytag v. Comm'r, 501 U.S. 868, 920 (1991) (Scalia, J., concurring); California v. Hodari D., 499 U.S. 621, 624 (1991); Moskal v. United States, 498 U.S. 103, 119-20 (1990) (Scalia, J., dissenting); Maryland v. Craig, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting); Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting); Ngiraingas v. Sanchez, 495 U.S. 182, 201-02 (1990) (Brennan, J., dissenting); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring); Reeves v. Ernst & Young, 494 U.S. 56, 77 (1990) (Rehnquist, C.J., dissenting in part); County of Allegheny v. ACLU, 492 U.S. 573, 648, 649 n.5 (1989) (Stevens, J., dissenting in part); Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 n.6 (1989); *id.* at 295 (O'Connor, J., dissenting in part); Will v. Mich. Dep't of State Police, 491 U.S. 58, 69-70 (1989); *id.* at 78-79 (Brennan, J., dissenting); Mallard v. U.S. Dist. Court, 490 U.S. 296, 301 (1989); United States v. Kozminski, 487 U.S. 931, 961-62 (1988) (Brennan, J., concurring); Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting); Doe v. United States, 487 U.S. 201, 221 n.2 (1988) (Stevens, J., dissenting); Regents of Univ. of Cal. v. Pub. Employment Relations Bd., 485 U.S. 589, 598 (1988); McNally v. United States, 483 U.S. 350, 370-71 (1987) (Stevens, J., dissenting); St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610-12 (1987); United States v. James, 478 U.S. 597, 605 n.6 (1986); *id.* at 615 (Stevens, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); United States v. Grace, 461 U.S. 171, 188 n.* (1983) (Stevens, J., dissenting); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 516 (1981); *id.* at 532 n.4 (Stevens, J., dissenting); Aaron v. SEC, 446 U.S. 680, 696 n.13 (1980); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 480 & n.10 (1979); United States v. Ramsey, 431 U.S. 606, 612 n.8 (1977); *id.* at 629-30 & nn.5-6 (Stevens, J., dissenting); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 nn.20-21 (1976); Ullmann v. United States, 350 U.S. 422, 453 n.8 (1956) (Douglas, J., dissenting); Lamar v.

This Note argues that old dictionaries are not reliable tools for determining the meaning of a word at the time of the dictionary's publication. Part I describes some of the pertinent aspects of the form and intended function of older dictionaries and describes the jurisprudential context in which these dictionaries often are used. Part II of this Note outlines the jurisprudential objectives behind the use of dictionaries and then discusses the theoretical and practical objections commentators have raised to the use of dictionaries in statutory interpretation. Part III revisits the objections to the general use of dictionaries in statutory construction and relates them specifically to the use of dictionaries as historical sources in statutory interpretation. Part III also raises some new objections specifically to the use of old dictionaries as neutral historical sources in statutory interpretation. Finally, Part III offers a brief look at some of the alternatives to old dictionaries. The Note concludes by suggesting a more responsible use of old dictionaries in determining the contemporary, common understanding of a word in a statute.

I. DICTIONARIES AND JURISPRUDENCE

This part of the Note provides some background information relevant to the use of dictionaries in statutory interpretation. Section A sketches a brief history of English lexicography from the eighteenth century to today. Section A then identifies a few pertinent characteristics of dictionaries. Section B describes the jurisprudential framework within which judges typically use dictionaries.

A. *Dictionaries in Context*

1. A Brief History of Descriptive Lexicography

Philip B. Gove, editor of *Webster's Third New International Dictionary*[17] ("*WNID3*"), wrote soon after the dictionary's publication in 1961 that it is the obligation of a dictionary to "act as a faithful recorder and interpreter of usage"[18] by "reflect[ing] the facts of usage as they exist."[19] Such a dictionary should provide an impartial description of the common understanding of a word. However, not all dictionaries strive to faithfully record and interpret usage. The *American Heritage Dictionary* ("*AHD*"), the first edition of which was

United States, 241 U.S. 103, 113 (1916); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 584 (1870).

17. Webster's Third New International Dictionary (1961) [hereinafter WNID3].

18. Philip B. Gove, *Linguistic Advances and Lexicography*, Word Study, Oct. 1961, at 3, *reprinted in* James Sledd & Wilma R. Ebbitt, Dictionaries and *That* Dictionary 65, 74 (1962).

19. Philip B. Gove, *Controversy: About the Dictionary*, 32 Am. Scholar 604, 605 (1963).

published a few years after the *WNID3*, purports to help "the ordinary user . . . discover just how and to what extent his presumed betters agree on what he ought to say or write."[20] The *AHD* prescribes to the common dictionary user the understanding uncommon people, the "presumed betters," have of a word. Such an approach to lexicography is prescriptive rather than impartial and descriptive.

The prescriptive approach to lexicography is not unique to the *AHD*, and it is certainly not an innovation.[21] In fact, when compared to most English dictionaries published before the *WNID3*, the *AHD*'s prescriptiveness is practically inconsequential. Earlier dictionaries were designed to serve a purpose very different from the *WNID3*'s: they were largely instructive rather than descriptive. The earliest dictionaries instructed the user in unfamiliar languages and terminologies. Later dictionaries instructed the user in how the lexicographer felt English should be used. Impartiality was not a characteristic thought relevant to dictionaries.

The earliest English dictionaries were bilingual, English-Latin and Latin-English dictionaries[22] that were used as teaching aids.[23] Indeed, the first known English-Latin dictionary, written perhaps as early as 1440, is titled *Promptorium Parvulorum sive Clericorum*.[24] In 1553, John Withals published *A Shorte Dictionarie for Yong Begynners*, another English-Latin dictionary-*cum*-teaching manual.[25] These bilingual dictionaries served to instruct rather than to describe.

The earliest monolingual English dictionaries were not much different. As the English language absorbed words from Latin and other languages, its vocabulary grew fat with new "hard words," creating a need for a somewhat different dictionary.[26] Robert Cawdrey's *A Table Alphabeticall . . .*,[27] written in 1604, is generally considered the first monolingual English dictionary.[28] As Cawdrey explains later in the title of *A Table Alphabeticall . . .*, the dictionary contains "hard usuall English wordes, borrowed from the Hebrew,

20. Morris Bishop, American Heritage Dictionary of the English Language xxiv (1st ed. 1969).

21. *See generally* Sidney I. Landau, Dictionaries: The Art and Craft of Lexicography 244-54 (2d ed. 2001) (tracing attitudes toward linguistic correctness in English lexicography and grammatical studies from the seventeenth century to the twentieth century).

22. *Id.* at 45.

23. *Id.*

24. *Id.* Landau translates the title as "storehouse [of words] for Children and Clerics." *Id.*

25. *Id.*

26. *Id.* at 47.

27. Robert Cawdrey, A Table Alphabeticall . . . (facsimile reprint 1966) (London, 1604).

28. Landau, *supra* note 21, at 43.

Greeke, Latine, or French, &c."[29] As with bilingual dictionaries, the purpose of dictionaries such as Cawdrey's was to "teach[]" uneducated people like "Ladies, Gentlewomen, or any other unskilfull persons."[30]

Specialized dictionaries, including law dictionaries, also appeared in the sixteenth and seventeenth centuries.[31] These dictionaries followed in the pedagogical tradition of the non-technical dictionaries. John Rastell's *Expositiones Terminorum Legum Anglorum*, published in 1527, was the first English law dictionary.[32] The purpose of this book was to teach "young students" legal terms.[33] John Cowell's *The Interpreter*, a legal dictionary published in 1607, was similarly intended to teach "young Students" of the law the words they needed for English legal practice.[34] This tradition culminated in later law dictionaries like Giles Jacob's *New Law Dictionary* of 1729 and Bouvier's 1839 American law dictionary, which David Mellinkoff describes as "a quick substitute for a legal education" and "offering a legal education," respectively.[35]

Later, truly monolingual dictionaries were also designed to instruct the reader, although in a different manner. These dictionaries tended to present the lexicographer's conception of correct English usage. Unlike bilingual and technical dictionaries, monolingual dictionaries of general scope were often created with little regard to the way a word was actually used; rather, they prescribed the usage the lexicographer preferred.

During the eighteenth, nineteenth, and even the twentieth, centuries, such linguistic prescriptivism abounded: it was a common sentiment that language usage could be inherently right or wrong.[36] Attitudes towards language were heavily influenced by grammarians who tried to apply to English the grammar of Latin, deeming erroneous English constructions that did not mirror Latin constructions.[37] Thus, for example, nineteenth-century grammarians condemned the English split infinitive by analogy to Latin: because the inflected Latin infinitive could not be split, the periphrastic English infinitive should not be split.[38] That split infinitives abounded in English usage and were prevalent in the writings of such esteemed

29. Cawdrey, *supra* note 27.
30. *Id.*
31. Landau, *supra* note 21, at 48.
32. David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. Rev. 423, 426 (1983). Of course, this was not an English language dictionary. *Id.*
33. *Id.*
34. John Cowell, The Interpreter 2 (facsimile reprint 2002) (Cambridge, 1607).
35. Mellinkoff, *supra* note 32, at 429-30.
36. Landau, *supra* note 21, at 244-54; *see* Edward Finegan, Attitudes Toward English Usage: The History of a War of Words 47 (1980).
37. Landau, *supra* note 21, at 244-54.
38. American Heritage Dictionary of the English Language 1678 (4th ed. 2000) [hereinafter AHD4].

authors as Daniel Defoe did not exonerate English speakers of offending against Latin grammar.[39]

Other grammarians and critics, believing the contemporary English to be a degraded form of the language, strove to return English to an earlier form.[40] Jonathan Swift, for example, complained in his *Proposal for Correcting, Improving and Ascertaining the English Tongue* that "our Language is extremely imperfect; that its daily Improvements are by no means in proportion to its daily Corruptions; that the Pretenders to polish and refine it, have chiefly multiplied Abuses and Absurdities; and, that in many Instances, it offends against every Part of Grammar."[41] Actual English usage was of little importance to these grammarians, too; rather, they often considered actual usage evidence of the deterioration of the language.[42]

Yet other grammarians sought to impose their own regional dialects on the entire language.[43] For example, William Dwight Whitney, a lexicographer and linguist who otherwise aimed to describe rather than prescribe usage,[44] wrote that "the people of Ireland and Scotland and of a part of the United States have long been inaccurate in their use" of "shall" and "will."[45] Noah Webster, who was born and educated in Connecticut, preferred the usage of the "eastern states," where, "among the unmixed English descendants," he wrote, he had never heard "an improper use of the verbs *will* and *shall*."[46] Regional dialects often informed grammarians' conceptions of "right" or "wrong" usage, and they prescribed accordingly.[47]

Politics also played a role in linguistic prescriptivism and attempts to influence linguistic change. A desire to distinguish America culturally from England provided one incentive for attempting to manipulate the development of the language.[48] Noah Webster wrote

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39. *See id.*

40. *See* Jonathon Green, Chasing the Sun: Dictionary Makers and the Dictionaries They Made 255 (1996).

41. Jonathan Swift, A Proposal for Correcting, Improving and Ascertaining the English Tongue 8 (facsimile reprint 1969) (London, 1712).

42. Landau, *supra* note 21, at 244. Indeed, it appears that vestiges of these views survive as anachronisms in our Supreme Court. *See infra* note 101.

43. Finegan, *supra* note 36, at 41.

44. *Infra* notes 88-89 and accompanying text.

45. William Dwight Whitney, Essentials of English Grammar § 286, at 120 (facsimile reprint 1988) (Boston, 1877).

46. Noah Webster, Dissertations on the English Language 240 (facsimile reprint 1951) (Boston, 1789).

47. These attitudes toward "right" and "wrong" usage sometimes took on a moral or quasi-religious character. Finegan, *supra* note 36, at 48 ("For many nineteenth-century English speakers, linguistic purity was next to godliness."). One prominent American grammarian explained his desire to teach grammar: "it must be the desire of every benevolent and intelligent man, to see the advantages of literary, as well as of moral culture, extended as far as possible among the people." Goold Brown, Grammar of English Grammars 101 (New York, 2d ed. 1857).

48. Allen Walker Read, *American Projects for an Academy to Regulate Speech*, 51

that "[a]s an independent nation, our honor requires us to have a system of our own, in language as well as government."[49] Accordingly, he titled his new dictionary *An American Dictionary of the English Language*.[50] Perhaps not surprisingly, Noah Webster has recently been accused of exaggerating the differences between English as spoken in America and in England.[51] Even in his own time, he was accused of trying to "*regulate*, not to *record*" the language, and of "attempting to force his peculiar notions upon the world in his Dictionary."[52]

On the other side of the Atlantic, lexicographer Samuel Johnson, who felt strongly about Americans in general,[53] was correspondingly critical of the changes Americans made to the language.[54] For example, Johnson objected to the meanings words like "creek," "gap," and "spur" had assumed in American geographical writings.[55] Accordingly, he did not include these meanings in his dictionary.[56] In effect, Johnson refused to confer legitimacy onto Americanisms by refusing to record them.[57]

Samuel Johnson also expressed partisan political views in his dictionary. For example, Johnson defined "Tory" as "[o]ne who adheres to the antient constitution of the state, and the apostolical

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Proceedings of the Modern Language Ass'n of Am. 1141, 1147 (1936).

49. Noah Webster, *supra* note 46, at 20.

50. *See* Dennis E. Baron, Grammar and Good Taste 33 (1982).

51. Landau, *supra* note 21, at 70.

52. *Review:* An American Dictionary of the English Language *(1859) by Noah Webster and* A Dictionary of the English Language *(1860) by Joseph E. Worcester*, 5 Atlantic Monthly 631, 632 (Boston, 1860) [hereinafter Atlantic Monthly Review]; *see* Noah Webster, An American Dictionary of the English Language, at preface (unpaginated) (New York, 1828) [hereinafter Webster (1828)].

53. *See* Bill Bryson, Made in America: An Informal History of the English Language in the United States 73 (1994). Samuel Johnson is reported to have called colonials "a race of convicts" who "ought to be grateful for anything we allow them short of hanging." *Id.*

54. *Id.*

55. *Id.*

56. Webster's dictionary records "a small river" as an American usage of "creek." Webster (1828), *supra* note 52. Johnson does not record this meaning. Samuel Johnson, A Dictionary of the English Language (unpaginated) (facsimile reprint 1990) (London, 1755) [hereinafter Johnson, Dictionary]. Likewise, Webster records under "spur," "In *America*, a mountain that shoots from any other mountain or range of mountains, and extends to some distance in a lateral direction, or at right angles." Webster (1828), *supra* note 52. Johnson has no corresponding entry. Johnson, Dictionary, *supra*. The second edition of the Oxford English Dictionary provides an example of "creek" with this meaning from 1622, 3 Oxford English Dictionary 1142 (2d ed. 1989) [hereinafter OED2], and an example of "spur" with this meaning from 1652, 16 OED2, *supra*, at 373, both from over a century before Johnson published his dictionary. Neither Johnson nor Webster records a geographical meaning for "gap." *See* Johnson, Dictionary, *supra*; Webster (1828), *supra* note 52.

57. Perhaps a less ill-humored example of Johnson's nationalist prejudices appears in his definition of "oats": "A grain, which in England is generally given to horses, but in Scotland supports the people." Johnson, Dictionary, *supra* note 56.

hierarchy of the church of England, opposed to a whig."[58] "Whig" he defined simply as "[t]he name of a faction."[59] Similarly, Johnson defined "excise" as "[a] hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid."[60] Clearly, Johnson did not intend these definitions to be impartial descriptions of the meanings of the words. The effects of Johnson's political views on his dictionary extend even beyond his efforts to control linguistic change.

In America, partisan political views—particularly views on federalism—affected efforts to determine linguistic development. Thomas Jefferson refused an honorary position in the proposed American Academy of Language and Belles Lettres, an institution proposed to standardize American English, because such a centralized, national institution conflicted with his anti-federalist views.[61] On the other hand, Noah Webster, a federalist,[62] sought to provide a unifying standard for American English through his *American Dictionary*.[63] In America, as in England, linguistic views and politics were sometimes closely related, and lexicographers expressed these views in and through their dictionaries.

Sentiments such as these resulted in calls to halt or guide linguistic change through official institutions like the American Academy of Language and Belles Lettres.[64] John Adams, for example, proposed that Congress create an academy called "the American Academy for refining, improving, and ascertaining the English Language."[65] In England, Daniel Defoe and Jonathan Swift, amongst others, proposed permanently prohibiting the change of English through the establishment of official, authoritative standards.[66] In France, a movement like these met with some success: *l'Académie française* created its *Dictionnaire*, which was intended to permanently fix the French language.[67]

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58. *Id.*
59. *Id.*
60. *Id.*
61. Read, *supra* note 48, at 1161.
62. *See* Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* . . . (Phila., 1787) *reprinted in* Pamphlets on the Constitution of the United States (Ford ed., Brooklyn, 1888).
63. *Infra* notes 77-78 and accompanying text.
64. *See* Finegan, *supra* note 36, at 20; *see generally* Read, *supra* note 48 (chronicling attempts to regulate English in the United States).
65. Read, *supra* note 48, at 1144 (quoting Letter from John Adams to the President of Congress (Sept. 5, 1780)).
66. Finegan, *supra* note 36, at 20-21. Finegan quotes Daniel Defoe's proposal of an academy that would "polish and refine the *English* Tongue, and advance the so much neglected Faculty of Correct Language, to establish Purity and Propriety of Stile, and to purge it from all the Irregular Additions that Ignorance and Affectation have introduc'd." *Id.* at 20.
67. *L'Académie française, l'histoire, at* http://www.academie-francaise.fr/histoire/index. html (last visited Mar. 7, 2003); *see also* Landau, *supra* note 21, at 59.

No official academy was instituted to fix the language in America or England, however. Perceiving a void, American and English lexicographers sought to provide their own standard.[68] Samuel Johnson proposed to make an English dictionary, "[t]he chief intent" of which would be "to preserve the purity and ascertain the meaning of our English idiom,"[69] much as had the "academicians of France."[70] To this end, Johnson proposed to record the English of "the best authors"[71] but to "correct such impurities as might be found in them, that their authority might not contribute, at any distant time, to the depravation of the language."[72] Because Johnson believed the English of the Elizabethan period to be the purest form of the language, he found authority in authors from that period.[73] Later changes to the language Johnson considered deviations to be remedied.[74] Upon completion of his project, Johnson conceded that it was beyond his power to restore English to its "golden age."[75] He modified his goals. As he wrote in the preface to his dictionary, "it remains that we retard what we cannot repel, that we palliate what we cannot cure."[76]

Although few other lexicographers expressed their prescriptivist goals quite as clearly as Johnson did, Johnson was by no means the only lexicographer to attempt to change the development of the language. Noah Webster endorsed the idea of an institution to fix the language[77] but thought that "such an Institution would be of little or no use, until the American public should have a dictionary which should be received as a standard work."[78] He of course proposed that his dictionary should be this standard.[79] Joseph Worcester, another American lexicographer, wrote of his own dictionary, "if, instead of tending to corrupt the language, it shall conduce to preserve and promote its purity and correctness . . . the author will feel that he has no reason to regret having performed the labor."[80]

These lexicographers' sentiments were not universal, however.[81] In 1857, Richard Chenevix Trench, Dean of Westminster, made a radical

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68. *See* Finegan, *supra* note 36, at 21.

69. Samuel Johnson, The Plan of a Dictionary 4 (facsimile reprint 1970) (London, 1747) [hereinafter Johnson, Plan].

70. *Id.* at 5.

71. *Id.* at 19.

72. *Id.* at 29-30.

73. Johnson, Dictionary, *supra* note 56, at preface.

74. *Id.*

75. *Id.*; Johnson, Plan, *supra* note 69, at 28.

76. Johnson, Dictionary, *supra* note 56, at preface.

77. Read, *supra* note 48, at 1145.

78. *Id.* at 1164 (quoting Noah Webster) (citations omitted).

79. *Id.*

80. Joseph E. Worcester, Dictionary of the English Language vii (Boston, 1860).

81. Starting in the eighteenth century, the study of language slowly developed into a scientific discipline with a corresponding focus on descriptions of languages and their development. *See* Anthony Fox, Linguistic Reconstruction: An Introduction to Theory and Method 17-36 (1995).

proposal.[82] He called for a new dictionary that would serve as "an inventory of the language,"[83] containing all the words of the English language. Trench wrote that the lexicographer should be "an historian . . . , not a critic."[84] Accordingly, Trench's lexicographer would include all the words of the language; rather than "select[ing] the *good* words of a language" and excluding the rest.[85] Trench's call became a lexicographer's manifesto[86] and eventually gave rise to the *Oxford English Dictionary* ("*OED1*").[87]

At about that time, dictionaries began to suffer a sea-change into something rich and strange—some lexicographers began to aspire to record actual usage. William Dwight Whitney, who would later edit *The Century Dictionary*,[88] wrote in his 1877 *Essentials of English Grammar* that the author of a grammar "is simply a recorder and arranger of the usages of language, and in no manner or degree a lawgiver; hardly even an arbiter or critic."[89] In 1858, the Philological Society initiated its work on *A New English Dictionary on Historical Principles*,[90] adhering to the guidelines Trench had outlined.[91] The completed *New English Dictionary* was republished in 1933 as the *Oxford English Dictionary*."[92] The *OED1* endeavored to "embrace[] not only the standard language of literature and conversation, whether current at the moment, or obsolete, or archaic, but also the main technical vocabulary, and a large measure of dialectal usage and slang."[93] The stated purpose of the Second Edition of the *Oxford English Dictionary* ("*OED2*"), published in 1989, was to record "all the common words of speech and literature, and . . . all words which approach these in character."[94] Yet even the *OED2* shies "the domain of . . . slang and cant, which touches the colloquial."[95] Although the field was far from immediately revolutionized, Trench's essay marks the beginning of a profound change in the nature of English lexicography.

Perhaps the most prominent example of this new sort of dictionary is the *WNID3*, published over a century after Trench's essay. That the

82. Richard Chenevix Trench, On Some Deficiencies in Our English Dictionaries (London, 2d ed. 1860).
83. *Id.* at 4.
84. *Id.* at 5.
85. *Id.* at 4.
86. Green, *supra* note 40, at 362.
87. 1 Oxford English Dictionary, at v (1933) [hereinafter OED1].
88. William Dwight Whitney, The Century Dictionary: An Encyclopedic Lexicon of the English Language (New York, 1889-91).
89. Whitney, *supra* note 45, at v.
90. 1 OED2, *supra* note 56, at xxxv.
91. 1 OED1, *supra* note 87, at v.
92. 1 OED2, *supra* note 56, at xlv.
93. 1 OED1, *supra* note 87, at v.
94. 1 OED2, *supra* note 56, at xxv.
95. *Id.* at xxv.

WNID3 succeeded in serving as "a faithful recorder and interpreter of usage"[96] is perhaps most clearly apparent in the reactions it elicited upon publication.[97] Soon after publication, the *WNID3* was widely disparaged for "cast[ing] the mantle of its approval over . . . corrupted English"[98] by attributing to words "senses that were not associated with those terms 50 years ago."[99] Many critics did not want a dictionary recording the common, contemporary understanding of words, especially not of common words. Even Justice Scalia derided the *WNID3* for reflecting the language as it was actually used: "intentional distortions, or simply careless or ignorant misuse, must have formed the basis for the usage that Webster's Third . . . reported."[100] Scalia continued:

> Upon its long-awaited appearance in 1961, Webster's Third was widely criticized for its portrayal of common error as proper usage. See, *e.g.*, Follett, Sabotage in Springfield, 209 Atlantic 73 (Jan. 1962); Barzun, What is a Dictionary? 32 The American Scholar 176, 181 (spring 1963); Macdonald, The String Unwound, 38 The New Yorker 130, 156-157 (Mar. 1962). An example is its approval (without qualification) of the use of 'infer' to mean 'imply': 'infer' '5: to give reason to draw an inference concerning: HINT (did not take part in the debate except to ask a question *inferring* that the constitution must be changed—*Manchester Guardian Weekly*).' Webster's Third New International Dictionary 1158 (1961).[101]

Thus it appears the editors of the *WNID3* achieved their goal of "stat[ing] meanings in which words are in fact used, not . . . giv[ing] editorial opinion on what their meanings should be."[102] Even now, over forty years after its first publication, the *WNID3* is still considered a "benchmark" in modern lexicography.[103]

The conception of the role of dictionaries has changed significantly over the last few centuries. This change reflects a general shift in attitudes toward language and language change. However, it also reflects a change in the understanding of the relationship between lexicographers and their dictionaries and between dictionaries and language. Whereas modern lexicographers are largely anonymous[104]

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96. Gove, *supra* note 18, at 74.

97. *See generally* Sledd & Ebbitt, *supra* note 18, at 50-250 (compiling criticisms of the *WNID3*).

98. *The Death of Meaning*, The Toronto Globe & Mail, Sept. 8, 1961, *reprinted in* Sledd & Ebbitt, *supra* note 18, at 53.

99. Roy H. Copperud, *English As It's Used Belongs in Dictionary*, Editor & Publisher, Nov. 25, 1961, *reprinted in* Sledd & Ebbitt, *supra* note 18, at 97.

100. MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994).

101. *Id.* at 228 n.3. Scalia, we must assume, also agrees with Macdonald that dictionaries should record the "the elite['s]" perception of the language. Finegan, *supra* note 36, at 124.

102. WNID3, *supra* note 17, at 4a.

103. Landau, *supra* note 21, at 3.

104. The editorial staff of the *WNID3* numbered almost 150, and over 200 outside

and their dictionaries intentionally impersonal, earlier dictionaries were closely associated with their creators,[105] and the books often reflected the lexicographers' prejudices and predilections.[106] Likewise, whereas dictionaries were once intended to affect the language, they are now largely expected to record and describe the language. Thus, the impersonal, descriptive dictionary—the sort of dictionary that would describe the common understanding of a word—is largely an innovation of the twentieth century.

2. Some Characteristics of Dictionaries

Benchmark though it be, the *WNID3* is not entirely innovative. There are certain lexicographical practices that touch the creation of all dictionaries, from Samuel Johnson's to the *WNID3*. Likewise, there are certain characteristics intrinsic to all dictionaries. Even the *WNID3* is not free of its lexicographical heritage.

Perhaps the most direct link between the *WNID3* and earlier dictionaries is the inclusion of parts of earlier dictionaries in the *WNID3*. Lexicographers, new and old alike, rely heavily on earlier dictionaries for content.[107] The *WNID3* of course drew heavily from previous Webster's dictionaries.[108] In creating his *American Dictionary*, Noah Webster borrowed from earlier dictionaries.[109] According to Sledd and Kolb, Noah Webster acknowledges his reliance on Johnson's dictionary in more than twenty citations in the first ten pages of the letter *C*.[110] In other cases, he copied entry words, definitions, and quotations from Johnson without acknowledgement.[111] Johnson himself started to write the first edition of his influential dictionary in an edition of Nathaniel Bailey's *Dictionarium Britannicum* interleaved with blank pages,[112] using Bailey's *Dictionarium* as the foundation of his dictionary. In turn, the

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experts were consulted. WNID3, *supra* note 17, at 6a-12a.

105. *See, e.g.*, Atlantic Monthly Review, *supra* note 52.

106. Thus, Johnson defines "lexicographer" as "a harmless drudge." Johnson, Dictionary, *supra* note 56.

107. As Sledd and Kolb put it, "[t]he student who is squeamish about plagiarism had simply better not study the old wordbooks." James H. Sledd & Gwin J. Kolb, *Johnson's* Dictionary *& Lexicographical Tradition: I, in* Dr. Johnson's Dictionary: Essays in the Biography of a Book 1, 4 (1955). Sidney I. Landau writes, "modern lexicographers, though more discreet [than earlier lexicographers], depend heavily on their predecessors as well, and often the line between using another dictionary as a source or reference and copying its definition with trivial changes is a fine one." Landau, *supra* note 21, at 45.

108. *See* Herbert C. Morton, The Story of *Webster's Third* 60-62 (1994).

109. Landau, *supra* note 21, at 72.

110. James H. Sledd and Gwin J. Kolb, *Dr. Johnson's* Dictionary *& Lexicographical Tradition: II, in* Dr. Johnson's Dictionary: Essays in the Biography of a Book 134, 198 (1955).

111. *Id.*

112. Green, *supra* note 40, at 227, 233; Sledd & Kolb, *supra* note 107, at 4.

1755 revision of Bailey's *Dictionarium* relied heavily on Johnson's dictionary.[113] Copying from previous dictionaries is simply part of how dictionaries are made.[114]

Dictionaries are and always have been characterized by chronological conservatism. Even dictionaries that are intended to reflect the state of the language at the date of publication cannot do so with accuracy. One cause of dictionaries' conservatism is that lexicographers typically do not add a new word or meaning to their dictionaries until they have compiled a sufficient number of citations to support it[115] or until another dictionary includes it.[116] Compounding this effect, lexicographers are usually reluctant to include in their dictionaries a word or meaning that they fear will soon be obsolete, even if the word is sufficiently attested.[117] Thus, for example, the *OED New Edition*, which is updated quarterly online,[118] added the 'computer network' meaning of "internet" and the related meaning of "browser" only in June of 2001.[119] The earliest attestation the *OED New Edition* provides for "internet" with this meaning is 1968, and the earliest listed attestation of "browser" with this meaning is from 1969.[120] Whether the editors feared the word would prove evanescent, or whether they simply did not have sufficient evidence to support the word's inclusion, in this case the *Oxford English Dictionary* lagged behind the language by some thirty years.

Further perpetuating this conservatism, lexicographers intentionally keep definitions free of time-specific qualities to delay obsolescence.[121] Yet, in so doing, lexicographers sacrifice some currency. The result is that dictionaries may not describe the current state of the language, even immediately after publication.

Many dictionaries are regularly revised so that they may better describe the current form of the language. However, the date of a dictionary's publication does not necessarily correspond to the date of the most recent revision of the dictionary's contents.[122] The Supreme

113. Green, *supra* note 40, at 234-35.

114. The same holds true for law dictionaries. For a history of copying in legal lexicography, see D. S. Bland, *Some Notes on the Evolution of the Legal Dictionary*, 1 J. Legal Hist. 75 (1980).

115. Landau, *supra* note 21, at 202-05.

116. *Id.* at 214.

117. *Id.* at 204.

118. *About the* Oxford English Dictionary, *at* http://www.oed.com/public/inside/ (last visited Mar. 6, 2002).

119. *Oxford English Dictionary News*, June 2001, *at* http://www.oed.com/public/news/0106.pdf. The *OED2* was published in 1989. OED2, *supra* note 56. Neither of these meanings was included then. *See* 7 OED2, *supra* note 56, at 1081-84; 2 OED2, *supra* note 56, at 595.

120. OED Online, *at* http://www.oed.com (subscription internet service) (last visited Mar. 6, 2003).

121. *See* Henry Bosley Woolf, *Definition: Practice and Illustration*, *in* Lexicography in English 253, 256 (Raven Ioor McDavid & Audrey R. Duckert eds., 1973).

122. This publication practice has eluded the Supreme Court on at least one

Court's use of *Webster's Third New International Dictionary* provides an example of this publication practice. The *WNID3* was published first in 1961, and since then the Court has referred to eight different publications of the dictionary.[123] Still, the bodies of these books differ only in the "[s]pecial updated Addenda Section of new words and meanings."[124] These repeated publications do not amount to a revision; the publication date is no indication of currency.

The *WNID3* thus shares some of the characteristics of its predecessors, and, indeed, incorporates some of them. However, the *WNID3* is far from representative of its predecessors, many of which were simply not intended to provide impartial descriptions of usage. The modern dictionary user should bear both these differences and these similarities in mind when turning to an old dictionary. These characteristics determine the dictionary's ability to describe the common, contemporary understanding of the meaning of a word.

B. *Judicial Use of Dictionaries*

Before the 1980s, the United States Supreme Court referred to dictionaries in less than ten percent of its opinions in each Term.[125] This figure has since more than tripled.[126] This section describes the jurisprudential grounds on which the Supreme Court now often cites to dictionaries, particularly to old dictionaries. The Court's increased use of dictionaries is tied to its search for the contemporary meaning of the text, whether that text is a statute or the Constitution.

Not only the frequency of the Supreme Court's use of dictionaries in statutory interpretation has increased in recent years;[127] one

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occasion. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.10 (1985), where the court referred to two copies of the *WNID3* with different publication dates as the fourth and fifth editions of *Webster's Third New International Dictionary*.

123. *E.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 490-91 n.4 (1996) (1961 publication); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995) (1966 publication); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 258 (1994) (1969 publication); United States v. Granderson, 511 U.S. 39, 71 (1994) (1971 publication); Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) (1976 publication); O'Gilvie v. United States, 519 U.S. 79, 83 (1996) (1981 publication); Clinton v. City of New York, 524 U.S. 417, 428 n.13 (1998) (1986 publication); Utah v. Evans, 122 S. Ct. 2191, 2205 (2002) (1993 publication).

124. The Merriam-Webster website, *at* http://www.m-w.com/book/diction/w3.htm (last visited Feb. 26, 2003). Earlier Webster's dictionaries also used an addenda section, a practice criticized over a century before the *WNID3* was published. Atlantic Monthly Review, *supra* note 52, at 637. The Supreme Court has never referred to the addenda section of any Webster's dictionary. Search of Lexis and Westlaw's United States Supreme Court databases with the following search terms: "Webster* /15 addenda," "Webster* /15 addendum."

125. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1454 (1994) [hereinafter *Looking It Up*].

126. *Id.*

127. *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 Buff. L. Rev. 227,

commentator has noted that the degree of the Court's reliance on dictionaries has also increased, developing from a method of identifying possible meanings of a word into the primary factor in determining the outcome of cases.[128] The Court's reliance on old dictionaries to determine the contemporary meaning of a statute has also increased dramatically in recent years.[129]

This increase in dictionary use has been linked to a change in the Court's method of interpreting statutes.[130] Over the past decade or two, the United States Supreme Court has returned to a textual or plain meaning method of statutory interpretation.[131] This "new textualism,"[132] perhaps most vocally championed by Justice Scalia[133] but now accepted by an effective majority of the Court,[134] largely limits the Court's interpretive resources to the text of the statute and the larger body of surrounding law.[135] The new textualist Justices eschew reliance on extrinsic sources like legislative history[136] or on any other method of discovering an unexpressed statutory purpose or legislative intent. Rather, they limit themselves to the text itself.[137]

When interpreting an older statute, new textualists seek the "ordinary, contemporary, common meaning" of the statute,[138] or the meaning the statute would have to "a reasonably well-informed citizen of the time."[139] To better understand the "contemporary,

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248-60 (1999).

128. *Looking It Up*, *supra* note 125, at 1440.

129. *See supra* note 16.

130. *See Looking It Up*, *supra* note 125, at 1440. *But see* David O. Stewart, *By the Book: Looking up the Law in the Dictionary*, A.B.A. J., July 1993, at 46, 46 (comparing dictionary usage to juniority of justices).

131. Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L. Sch. L. Rev. 149, 149 (2001).

132. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

133. Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 52 (1997). Justice Scalia is not the only one to have expressed ideas of this sort. Judge Easterbrook, for example, expresses many of the same ideas. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61 (1994). Scalia, however, provides a convenient and influential exposition of textualism in his essay. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 3 (Amy Gutmann ed., 1997).

134. Schwartz, *supra* note 131, at 149; *see* Easterbrook, *supra* note 133, at 67 (finding that even judges not typically considered textualists sometimes bypass "clear, direct intent of Congress" when it conflicts with plain meaning of text).

135. Mikva & Lane, *supra* note 133, at 52.

136. *Id.*

137. Scalia, *supra* note 133, at 25-27. This is the "particular methodology of constitutional interpretation" Hovenkamp referred to. *See supra* note 10 and accompanying text. "Justice Thomas's historical methodology was torn out of Justice Scalia's notebook." Hovenkamp, *supra* note 9, at 2229 n.73.

138. Perrin v. United States, 444 U.S. 37, 42-45 (1979). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Id.* at 42.

139. Laurence H. Tribe, *Comment*, *in* A Matter of Interpretation 65, 72 n.14 (Amy

common meaning" of a statute when the meaning of its constituent words may have changed, the new textualists endorse the limited use of some extrinsic materials. For example, Justice Thomas looked beyond the statute in question in his dissent in *Rowland v. California Men's Colony*.[140]

Rowland required the Court to determine whether the word "person" as it appeared in 28 U.S.C. § 1915, the statute governing proceedings in forma pauperis, included non-natural persons.[141] The majority held that, because the statute required that the person be impoverished and because "[p]overty . . . is a human condition," the statute did not apply to non-natural persons.[142] Justice Thomas dissented because he "doubt[ed] that using the word ['poverty'] in connection with an artificial entity depart[ed] in any significant way from settled principles of English usage."[143] For examples of non-natural persons described as "poor," Thomas quoted Justice Holmes, two state court opinions, and an unrelated federal statute.[144] In these usages, Thomas found support for his argument that the statute should apply to non-natural persons as well as to natural persons.

When interpreting the Constitution, new textualists are willing to look even further beyond the four corners of the text. For example, Justice Scalia refers to the writings of contemporary theorists, framers and non-framers alike, for insight into how the Constitution was originally understood.[145] However, new textualists limit their extrinsic sources to those that help make plain the meaning of the text or that inform how the text would have been understood at the time it was enacted.[146] To these ends, new textualists also turn to dictionaries to identify the "plain meaning" of statutory or Constitutional terms.[147]

Textualist analysis and the search for the contemporary meaning of the text are of course not the exclusive domains of the new textualists. Often the contemporary understanding of the text is one method of interpretation used in conjunction with others. For example, in determining the constitutionality of the Copyright Term Extension Act in *Eldred v. Ashcroft*,[148] Justice Ginsburg, writing for the majority, first examined the text of the Copyright Clause with no aid other than one modern dictionary and two dictionaries contemporary with the

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Gutmann ed., 1997).

140. 506 U.S. 194, 212 (1993) (Thomas, J., dissenting).

141. *Id.* at 196.

142. *Id.* at 203.

143. *Id.* at 218.

144. *Id.* at 219.

145. Scalia, *supra* note 133, at 38.

146. *Id.*

147. *See, e.g.*, Mississippi v. Louisiana, 506 U.S. 73, 78 (1992). Although the methods and goals of statutory and constitutional interpretation differ, this distinction is not relevant to the purposes of this Note. The implications of the use of dictionaries are the same in both enterprises.

148. 123 S. Ct. 769 (2003).

Constitution.[149] On the basis of these dictionary definitions alone, Ginsburg concluded that, at the time of the framing, the word "limited" as it appeared in the Copyright Clause "meant what it means today: 'confine[d] within certain bounds,' 'restrain[ed],' or 'circumscribe[d].'"[150] Only after having determined that the CTEA did not violate the text of the Constitution as it was understood at the time of the framing did Justice Ginsburg turn to other tools of Constitutional interpretation, namely history and precedent.[151] The initial, textualist step of Ginsburg's approach is identical to the step a new textualist would take. However, the new textualism would require that Ginsburg's first step—interpreting the contemporary, common understanding of the text—also be her last step. Ginsburg, although not limiting herself to the new textualist method of interpretation, began with an analysis that incorporated the new textualist approach.

Because "the meaning of words may change over time,"[152] and because a new textualist analysis should determine the contemporary meaning of a word in a statute, new textualists often require an extrinsic aid in interpreting the statute. Yet, the only extrinsic sources consistent with the goals of the new textualism are those which shed light on only the contemporary understanding of the language of the statute. Accordingly, the Supreme Court often uses dictionaries contemporary with the statute.[153] The usefulness of a dictionary seems obvious—the very function of a dictionary is often understood to be to describe the meaning of a word at the time the dictionary was published. Such a description would be entirely consistent with the new textualist method of interpretation.

II. PROBLEMS WITH THE PRACTICE

Tools like dictionaries would seem to facilitate the new textualists' search for the common, contemporary understanding of a statute. However, the Court's use of dictionaries has not gone without

149. *Id.* at 778.

150. *Id.* (quoting S. Johnson, *A Dictionary of the English Language* (7th ed. 1785) and citing T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) and *Webster's Third New International Dictionary* 1312 (1976)).

151. *Id.* at 778-81.

152. Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994).

153. *See supra* note 16. This practice is of course not limited to the Supreme Court. As is the case with the new textualism in general, as it becomes an increasingly popular interpretive method in the Supreme Court, the lower federal courts must also adopt it. *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749, 752 (1995). Commentators too use old dictionaries to better appreciate the contemporary understanding of a word. *See, e.g.*, Thomas E. Plank, *Bankruptcy and Federalism*, 71 Fordham L. Rev. 1063, 1077 n.56 (2002). However, the Supreme Court's opinions serve as a convenient sample set for the purposes of this Note.

comment. This part of the Note surveys the relationship between the Supreme Court's jurisprudence and dictionaries. Section A describes the aspects of the new textualism that create the need for tools like dictionaries as aids in statutory interpretation. Section B reviews the primary criticisms of the Supreme Court's use of dictionaries.

A. *A Defense of the Practice*

As described above,[154] textualists avoid most extrinsic sources when intepreting statutes and rely instead on the plain meaning of the text. The tenets of this method of interpretation, as described in this section, require rejection of reliance on many tools that could be used in interpreting a statute when its meaning is not plain. As new textualists sometimes find themselves needing some aid in interpreting a statute, they turn to dictionaries.

One of the tenets of the new textualism is the rejection of the significance of legislative intent.[155] Justice Scalia argues that it is the law, as expressed in the text of the statute, that controls in a democratic—or indeed in any fair—government.[156] Government by an unexpressed intent is tantamount to tyranny[157] and "seems to [Scalia] one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read."[158]

More fundamentally, Justice Scalia rejects the very existence of a legislative intent for most of the issues that confront the courts.[159] When drafting necessarily broad legislation, legislators do not consider most of the finer points that ultimately concern courts.[160] Accordingly, there exists no legislative intent as to how the statute should apply to the matters before the court. Any search for such intent is necessarily futile, any clues necessarily false.[161]

Additionally, the new textualists reject dependence on legislative history in part on practical grounds.[162] Even if one accepts the divining of legislative intent as a valid jurisprudential goal, legislative history, argues Scalia, will not reliably identify that intent.[163] The components of the legislative history offer little insight into the legislators' actual understanding of the provision. Scalia argues that committee reports, for example, are largely unread by the legislators

154. *Supra* Part I.B.
155. *See* Scalia, *supra* note 133, at 16-23.
156. *Id.* at 17.
157. *Id.*
158. *Id.*
159. *Id.* at 32.
160. *Id.*
161. *See id.*
162. *Id.* at 29-37.
163. *Id.* at 29-30.

or even by the issuing committee.[164] Further, the sources of legislative history are easily manipulated during their development.[165] For example, Scalia is concerned that lobbyists routinely draft scripted language that "sympathetic legislators" insert into committee reports or read in floor debates.[166] Finally, the history of a piece of legislation is likely to be so expansive as to afford a judge support for most any desired result.[167] Indeed, Scalia finds the pursuit of legislative intent to be little more than an excuse for judges to impose their own will on the text of the statute,[168] whereas strict adherence to the text limits the powers of a judge.[169]

Justice Scalia is not the only jurist to articulate a defense of the preference for the language of the text over other methods like legislative intent. Judge Easterbrook, for example, expresses many of the same justifications for rejecting the search for legislative intent that Justice Scalia does.[170] Like Scalia, Easterbrook believes the search for legislative intent gives the court more discretion and power than "an objective inquiry into the reasonable import of the language" would give.[171] This power and discretion results because a judge searching for the original intent of the legislature must make a series of subjective decisions.[172] Easterbrook has likened searching for legislative intent to "rummag[ing] the minds of the drafters" and has expressed concern that what judges "find there may have more in common with the judges' beliefs than with the authors'."[173]

Thus, when textualists require an interpretive aid, they often turn to dictionaries. Although dictionaries are extrinsic to the text of a

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164. *Id.* at 32.

> I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.

Hirschey v. Fed. Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (footnote omitted).

165. *See generally* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005 (1992).

166. Scalia, *supra* note 133, at 34.

167. *See id.* at 36.

168. *Id.* at 17-18.

169. *See id.*

170. Easterbrook, *supra* note 133, at 68 (arguing that there is no single legislative intent behind a statute and that statutes do not cover every situation that confronts the court).

171. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 62 (1988).

172. *Id.*

173. Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 365 (7th Cir. 1987).

statute, the use of dictionaries could appear consistent with the new textualist methods and goals. Dictionaries seem to offer a convenient description of the usage and meaning of a word at the time of the dictionary's publication—a description of how the word would have been understood by the reasonably well-informed contemporary. A dictionary does not purport to offer insight into some hidden, monolithic legislative intent. Rather, dictionaries describe only language, and it is the language of a statute that new textualists concern themselves with. A dictionary would seem such a reasonable tool that it is hardly surprising that the new textualists have not articulated a cogent defense of its use in statutory interpretation.[174] No defense seems necessary.

B. *Criticisms of Dictionary Use*

Commentators have criticized the Court's use of dictionaries. Criticism of the use of dictionaries in statutory interpretation follows two lines. The first line of criticism, discussed in the first part of this section, is methodological: judges have devised no consistent, objective method for determining which dictionary to use and which definition to apply.[175] The second and more fundamental line of criticism, described in the second part of this section, is that dictionaries do not accurately reflect the meaning of a word in a particular context.[176] This section is limited to a discussion of those criticisms that are particularly relevant to the use of old dictionaries in interpreting old statutes.

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174. The Federal Circuit, for example, has justified its correlation of dictionaries' definitions of a word to the common meaning of that word with conclusory statements and appeals to precedent. *E.g.*, Rocknel Fastener, Inc. v. United States, 267 F.3d 1354, 1356 (Fed. Cir. 2001) ("To ascertain the common meaning of a term, a court may consult dictionaries." (internal quotation marks omitted)) (citing precedent); IBM v. United States, 201 F.3d 1367, 1372 (Fed. Cir. 2000) ("[W]e assume that the terms have their ordinary meaning, for which we may consult a dictionary.") (citing precedent); Best Power Tech. Sales Corp. v. Austin, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary." (citation omitted)).

175. *See* Christian E. Mammen, Using Legislative History in American Statutory Interpretation 15-16 (2002); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 310 (1998); Stewart, *supra* note 130, at 47; Thumma & Kirchmeier, *supra* note 127, at 285-86; *Looking It Up*, *supra* note 125, at 1447-48.

176. Aprill, *supra* note 175, at 313; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 71, 73-74 (1994); *Looking It Up*, *supra* note 125, at 1449-52; James L. Weis, Comment, *Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*, 39 Mercer L. Rev. 961, 962 (1988); *cf.* Aaron J. Rynd, *Dictionaries and the Interpretation of Words: A Summary of Difficulties*, 29 Alta. L. Rev. 712, 716-17 (1991).

1. No Consistent Methodology

Samuel A. Thumma and Jeffrey L. Kirchmeier have calculated that, during the 1997-1998 Term, the United States Supreme Court cited to some 120 different dictionaries.[177] Yet the Court has articulated no system for choosing the dictionary to be used.[178] Nor has it furnished a rationale for needing so many dictionaries.[179] The absence of any discernable system is conspicuous.

Thumma and Kirchmeier trace the path a jurist must follow when using a dictionary.[180] When looking up a word, first the dictionary user must decide whether to use a general dictionary or a "special field"[181] dictionary.[182] In the case of the judicial use of dictionaries, the choice is typically between a general English language dictionary and a law dictionary.[183] Second, the user must decide which particular dictionary to use.[184] Third, the user must choose a specific edition of the dictionary.[185] Finally, the user must choose the appropriate definition.[186] Each step of this process requires the dictionary user to make interpretive decisions.

The Court has drawn criticism at every step of this process. First, the Court has failed to explain or imply a system for determining whether to use a "special-field" dictionary or a general usage dictionary.[187] *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*[188] illustrates the significance of such a choice. That case concerned federal statutes allowing courts to award attorney's fees and costs to the "prevailing party."[189] The issue before the Court was whether the term "prevailing party" included a party that was not awarded relief by the court but that nevertheless achieved the desired results because the lawsuit led to the defendant's voluntary change in conduct.[190] Chief

177. Thumma & Kirchmeier, *supra* note 127, at 262.
178. *See id.* at 264.
179. *See id.*
180. *See id.* at 264-76.
181. Landau, *supra* note 21, at 32.
182. *See* Thumma & Kirchmeier, *supra* note 127, at 262-64.
183. *But see, e.g.*, K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 184 (1988) (referring to a dictionary of business terms); Shields v. Atl. Coast Line R.R. Co., 350 U.S. 318, 326 n.2 (1956) (referring to The Car-Builder's Dictionary); Patapsco Ins. Co. v. Coulter, 28 U.S. (3 Pet.) 222, 230 (1830) (referring to the Court's "best French dictionary").
184. *See* Thumma & Kirchmeier, *supra* note 127, at 267-72.
185. *Id.* at 267-69; *see, e.g.*, MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 225-28 (1994) (referring to different definitions of the same word in different editions of a dictionary).
186. Thumma & Kirchmeier, *supra* note 127, at 274-76.
187. *See id.* at 262-64.
188. 532 U.S. 598 (2001).
189. *Id.* at 600.
190. *Id.*

Justice Rehnquist, writing for the Court, cited to *Black's Law Dictionary* and decided that a prevailing party was "one who has been awarded some relief by the court."[191] Thus, fees and costs were not awardable.[192] Justice Ginsburg, writing for the dissent, cited to the *WNID3* in support of the contention that a party prevails when it "achieve[s] actual relief from an opponent."[193] Accordingly, the dissent would have found fees and costs awardable.[194] It would seem that ultimately the choice between a general and a special field dictionary depends on a judge's intuitive impression of whether a word has a specific, technical meaning and then whether that technical meaning should be applied.

After determining which sort of dictionary to refer to, the judge must determine which particular dictionary and edition to use. The Court similarly has no method for making this choice.[195] As Thumma and Kirchmeier point out, the choice of dictionary has affected the outcome of cases.[196] By way of example, they identify *Farmer v. Brennan*,[197] where the majority held that for an act or omission to constitute punishment as contemplated by the Eight Amendment, it must be accompanied by knowledge that the act or omission creates a significant risk of harm.[198] In his concurring opinion to that case, Justice Blackmun argued that the word "punishment" need not imply an identifiable punisher with a culpable state of mind.[199] He supported this argument with definitions of "punishment" from *Webster's New International Dictionary* and the *WNID3*.[200] In a separate concurrence,[201] Justice Thomas referred to Sheridan's 1780 *A General Dictionary of the English Language* and argued that, "[a]s an original matter," because the act or omission "was not part of [the inmate's] sentence, it did not constitute 'punishment' under the Eighth Amendment."[202] Thomas, using a different dictionary, found a definition of "punishment" that was different from Blackmun's.[203]

After having decided on a dictionary, a judge must choose a specific definition within that dictionary. The choice of a particular definition

191. *Id.* at 603.
192. *Id.* at 600.
193. *Id.* at 634.
194. *Id.* at 644. It is interesting to note that the only other opinion, a concurrence by Justice Scalia, in which Justice Thomas joined, contained no references to dictionaries. *Id.* at 610-22.
195. *See Looking It Up*, *supra* note 125, at 1448 n.77 (speculating that Justice Scalia chooses an edition based on its prominence in his chambers).
196. Thumma & Kirchmeier, *supra* note 127, at 291.
197. 511 U.S. 825 (1994).
198. *Id.* at 837-38.
199. *Id.* at 854.
200. *Id.* at 854-55.
201. *Id.* at 858.
202. *Id.* at 859.
203. *Id.*

is therefore an interpretive choice,[204] and the Court has articulated no systematic way of choosing the definition to be used.[205] Indeed, any such system necessarily would be either arbitrary or entirely subjective.

As Aprill points out, the choice of definition can determine the Court's holding.[206] To use Aprill's example, in *Smith v. United States*,[207] the Court referred to *Webster's Second New International Dictionary* ("*WNID2*") to determine the meaning of "country" in the foreign country exception to the Federal Torts Claims Act.[208] On the basis of the first definition—"[a] region or tract of land"—and without mention of the second definition—"a political state or nation"[209]—the Court determined that the "sovereignless"[210] Antarctica is a foreign country.[211] The Court provided no justification for relying exclusively on the first definition,[212] even though the second may have been more appropriate to the context.

One commentator has noted that "[s]electing a dictionary and then relying upon its definitions are themselves interpretive choices."[213] This criticism of dictionary use echoes one of Scalia's reasons for eschewing reliance on legislative intent or history.[214] Although the spectrum of dictionaries and definitions may not be as broad and divergent as the sources encompassed by the legislative history of a statute, different definitions and different dictionaries can support contrary opinions. Without a consistent method, a judge has almost unbridled discretion in deciding which dictionary and which definition to rely on. Likewise, the choice of a dictionary and definition can turn on a subjective decision such as whether a judge chooses to interpret a word as a term of art. Yet new textualists rely on a "solid textual

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204. *Cf.* Roger W. Shuy, *A Lexicography Legacy of Fred Cassidy: Forensic Linguistics*, 77 Am. Speech 344, 346-48 (2002) (describing the importance of the choice of definition).

205. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), for example, the Court and the dissent use different definitions from the same dictionary to support their conclusions. *Compare id.* at 69-70, *with id.* at 78-79 (Brennan, J., dissenting).

206. *See* Aprill, *supra* note 175, at 298.

207. 507 U.S. 197 (1993).

208. *Id.* at 201.

209. Aprill, *supra* note 175, at 298 (quoting Webster's New International Dictionary 609 (2d ed. 1945)).

210. *Smith*, 507 U.S. at 198.

211. *See id.* Randolph points out that Black's Law Dictionary provides a definition that would have required the opposite result. Randolph, *supra* note 176, at 73.

212. *See Smith*, 507 U.S. at 197.

213. Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 Fordham L. Rev. 761, 768 n.42 (1990).

214. *See supra* Part II.A. Unscrupulous exercise of this discretion has less charitably been called "the dictionary shell game." Conversation with David Yerkes, Professor, Colum. U., in New York, N.Y. (Nov. 11, 2002).

anchor"[215] to restrict a judge's discretion in interpreting a statute.[216] The unrestricted discretion and the subjective decisions involved in choosing a dictionary and definition are contrary to the methods and goals of the new textualism.[217]

2. Dictionary Definitions Are Acontextual

A second and more fundamental criticism of the use of dictionaries in statutory interpretation is that words do not have discrete, immutable meanings independent of context.[218] Yet it is just such a meaning that dictionaries purport to provide. As commentators have noted, the static definition from a dictionary will therefore be of limited usefulness when applied to a particular statutory context.[219]

The meaning of a word can vary depending on the immediate linguistic context and on the larger, social context. A. Raymond Randolph states the objection nicely: "I think [dictionaries] are . . . like 'word zoos.' One can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings. The same is true of words in a text."[220] The Court, it appears, once agreed: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[221]

Failing to recognize this limitation is to misunderstand the function of dictionaries. It is the purpose of most dictionaries to present a broad overview of various meanings of a word,[222] typically for consumption by a reader unfamiliar with the word.[223] Dictionaries do not purport to define the precise semantic boundaries of a word in one particular instance, and a dictionary will not contain a definition corresponding to every contextual meaning or usage of a word.[224]

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215. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989).

216. *See id.*

217. *See supra* Parts I.B., II.A.

218. *Supra* note 176; *see* Ladislav Zgusta, Manual of Lexicography 47 (1971) ("Words do not have an abstract existence of their own as some unalterably defined units of a system.").

219. *See supra* note 176.

220. Randolph, *supra* note 176, at 73-74.

221. Towne v. Eisner, 245 U.S. 418, 425 (1918).

222. *See* Zgusta, *supra* note 218, at 253 ("[T]he lexicographic definition enumerates only the most important semantic features of the defined lexical unit.").

223. Landau, *supra* note 21, at 6 ("Dictionary definitions are usually confined to information that the reader must have to understand an unfamiliar word.").

224. *See* Zgusta, *supra* note 218, at 47-59; *see also* Georgia M. Green, Pragmatics and Natural Language Understanding 56 n.17 (1989). Green notes that

> a survey of three arbitrarily chosen 200-word passages from works of modern American fiction revealed that an average of 15% of the nouns, verbs, and adjectives in them were used in senses that are not covered by the

Thus, the use of dictionaries in statutory interpretation is not without its problems. Methodologically, the absence of a principled system for choosing a dictionary and definition provides the judge with too much discretion and too little guidance. Practically, the usefulness of the definition provided in a dictionary is limited because a word derives much of its meaning from its context. For both of these reasons, blithe reliance on dictionary definitions can subvert a textual analysis.

III. OLD DICTIONARIES FOR OLD STATUTES

The criticisms of the use of dictionaries as interpretive tools, as developed above,[225] are especially apt when applied to the use of older dictionaries. However, alternative methods are also problematic. This part of the Note explores two methods used to ascertain the former meaning of a word in an old statute. First, this part examines the use of contemporary dictionaries in interpreting old statutes and argues that old dictionaries are not effective tools for discovering the former meaning of a word as used in an old statute. Second, this section contrasts the use of old dictionaries to a broader, usage-based method of determining the contemporary meaning of a word; yet, it faults that method too. As they are typically used, neither method proves a reliable tool for interpreting old statutes.

A. *Old Dictionaries*

The use of old dictionaries in interpreting old statutes, although tempting, poses a number of problems. This section assesses some of these problems. First, this section applies the general criticisms of the use of dictionaries in statutory interpretation[226] specifically to the use of old dictionaries. Second, this section identifies and explores some characteristics inherent to all dictionaries that become problematic when the dictionaries are old. Finally, this section identifies and examines some troublesome characteristics peculiar to old dictionaries.

1. General Criticisms Applied to the Use of Old Dictionaries

The new textualists' use of old dictionaries highlights how many of the problems associated with the use of dictionaries in statutory interpretation are exacerbated when the dictionaries are old. The Court's lack of a system for choosing a dictionary and a definition

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entries in a large desk dictionary. (The range was 7% to 29%.)
Id. These statistics are, of course, of little significance, as determining the extent of a definition is inherently a subjective pursuit, but Green's point is clear.

225. *Supra* Part II.B.

226. *Supra* Part II.B.

raises interpretive problems,[227] and the inability of a dictionary to indicate the particular significance of a word in a specific context creates practical problems.[228] These general objections to the use of dictionaries in statutory interpretation take on particular importance when judges use old dictionaries in interpreting old statutes.

a. *No Consistent Methodology*

The Court's failure to develop a principled system for deciding which sort of dictionary to use, which particular dictionary to use, and which definition to use,[229] is particularly problematic when the case involves older statutes and dictionaries. In the case of old statutes, this problem is more troubling because the judge does not have an intuitive understanding of the language. The judge thus lacks the guidance of intuition when making the interpretive choices that can have significant effects on a judge's conception of the meaning of a statute.

The choice between a special-field or general dictionary[230] is even more problematic when the statute is old because the modern reader may lack an intuitive sense of whether a word is a term of art. *Smiley v. Citibank (South Dakota), N.A.*[231] illustrates this issue. In that opinion, the Court referred exclusively to legal dictionaries of the era to determine whether flat fees on a loan constituted "interest" as the term was used in the National Bank Act of 1864.[232] In the next paragraph of the opinion, the Court consulted both a contemporary general usage dictionary and a contemporary legal dictionary to determine whether a flat fee was a "rate" as the word appeared in the National Bank Act.[233] All this was done without comment and with no readily discernable system.[234]

The issue is even more clearly apparent in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*[235] In *Browning-Ferris*, the majority and dissent disagreed on whether punitive damages constituted "fines" under the Eight Amendment. The majority, basing its argument largely on Cunningham's 1771 *A New and Complete Law-Dictionary*,[236] determined that civil damages fell outside of the contemporary understanding of the word "fine" at the

227. *Supra* Part II.B.1.
228. *Supra* Part II.B.2.
229. *Supra* Part II.B.1.
230. *Supra* notes 181-94 and accompanying text.
231. 517 U.S. 735 (1996).
232. *Id.* at 745.
233. *Id.* at 746.
234. *Id.* at 745-46.
235. 492 U.S. 257 (1989).
236. *Id.* at 265 n.6.

time of the framing.[237] Justice O'Connor, dissenting in part, referred to the sixth edition of Sheridan's *A Dictionary of the English Language*, published in 1796, and the seventh edition of Johnson's *A Dictionary of the English Language*, published in 1785—both general usage dictionaries—in arguing that the contemporary understanding of "fine" "was much more ambiguous" than the majority held.[238] Thus, the case turned on whether a law dictionary or a general dictionary was used. Here, unlike a case involving a modern statute, the Justices cannot be expected to have an intuitive sense of whether "fine" was commonly understood to bear a special meaning as a term of art over two centuries ago. Thus, the absence of an objective system creates even less coherent results.[239]

Even when the choice is limited to general usage dictionaries, the decision is significant: definitions vary substantially in these idiosyncratic books. For example, James Stormonth's *A Dictionary of the English Language* includes "reckless" in his definition of the adjective "wanton,"[240] whereas a contemporary edition of Noah Webster's *An American Dictionary of the English Language* makes no mention of recklessness.[241] Such a distinction could make a difference to a modern judge.[242]

Finally, the absence of a method for choosing a particular definition in an old dictionary is problematic. Although the Court has not yet split in reliance on different definitions from the same old dictionary, it is not unlikely that such a situation will arise. "Commerce" in Noah Webster's 1828 *Dictionary* could provide for such a situation. As Hovenkamp points out, Noah Webster's 1828 *American Dictionary of the English Language* provides two definitions for "commerce."[243]

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237. *Id.* at 265.

238. *Id.* at 295.

239. One method that seems practical at first blush but that ultimately is of little value lies in the subject labels like "mineralogy" that dictionaries sometimes provide in their definitions. *See, e.g.*, WNID3, *supra* note 17, at 16a-17a. Consistent with the idea that general dictionaries reflect the common understanding of a word, the judge would refer to special-field dictionaries only when the general usage dictionary marks a definition with a subject label. Such a label would, in theory at least, indicate that the common understanding of the word was that it had a special significance in a particular field. In practice, however, it is not clear that the contents of legal and general-usage dictionaries were or are now much different. *See* Mellinkoff, *supra* note 32, at 428, 431, 434, 436. Furthermore, many older dictionaries, intentionally or otherwise, excluded jargon and terms of art. *See, e.g.*, Johnson, Dictionary, *supra* note 56, at preface; Worcester, *supra* note 80, at v.

240. James Stormonth, A Dictionary of the English Language 1146 (New York, 1885).

241. Noah Webster, An American Dictionary of the English Language 1490 (Springfield, Mass., 1869) [hereinafter Webster (1869)].

242. However, see Justice Rehnquist's dissent in *Smith v. Wade*, 461 U.S. 30, 60 n.3 (1983) (Rehnquist, J., dissenting), where the difference apparently was not relevant in determining that "wantonness" connoted "actual malice." *Id.*; *see infra* notes 309-14 and accompanying text.

243. Hovenkamp, *supra* note 9, at 2229.

The first definition—"an interchange or mutual change of goods, wares, productions, or property . . . either by barter, or by purchase and sale; trade; traffick"[244]—is narrow, like Justice Thomas's definition in his *Lopez* opinion.[245] The second definition—"[i]ntercourse between individuals; interchange of work, business"[246]—is broader and does not support Thomas's conception of the meaning of the word at the time of the framing. Although Webster's *American Dictionary* is not strictly contemporary with the Constitution, this entry, or another like it, could prove troublesome.

Apparently, the Court may have, albeit unsuccessfully, attempted to develop a systematic way of choosing dictionary definitions. Presumably in an attempt to adhere to some sort of system, some Supreme Court opinions cite to the "primary sense" of a word.[247] In *Rowland v. California Men's Colony*,[248] Justice Souter cited the "primary sense" of the word "poverty" in the *WNID2*.[249] Similarly, in *United States v. Ramsey*,[250] the majority referred to the "the most common use" of the word "envelope" as "state[d]" by Worcester's[251] and Webster's[252] dictionaries,[253] and Justice Stevens, dissenting, cited to the "primary definitions given" by those dictionaries.[254] None of the definitions cited to indicate that the meaning referred to has any semantic primacy.[255] As each definition referred to is the first definition for the entry word, we must assume that the Justices decided that the first definition corresponds to the "primary sense." Such a decision is essentially arbitrary. The definitions in the *WNID2* and Webster's 1869 dictionary are arranged historically,[256] and Worcester does not indicate the order in which he arranged his definitions.[257] The order of the definitions provides no support for the Court's preference for the first definition.

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244. Webster (1828), *supra* note 52.
245. *Supra* notes 4-7 and accompanying text.
246. Webster (1828), *supra* note 52.
247. Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194 (1993).
248. *Id.*
249. *Id.* at 203.
250. 431 U.S. 606 (1977).
251. Worcester, *supra* note 80.
252. Webster (1869), *supra* note 241.
253. *Ramsey*, 431 U.S. at 612 n.8.
254. *Id.* at 630 n.5.
255. *See* Webster's Second New International Dictionary 1919 (2d ed. 1942) [hereinafter WNID2]; Webster (1869), *supra* note 241, at 454; Worcester, *supra* note 80, at 491.
256. WNID2, *supra* note 255, at xv ("The earliest ascertainable meaning is always first . . . ."); Webster (1869), *supra* note 241, at vi ("An effort has been constantly made to develop and arrange the several meanings and groups of meanings in the order of their actual growth and history, beginning, if possible, with the primitive signification."). It is unlikely that the Justices intended to refer to the chronologically primary sense of the word.
257. *See* Worcester, *supra* note 80, at iii-vii.

Ultimately, dictionary use is not amenable to a rigid system. Rather, at each step of the process, the dictionary user must determine based on an intuitive understanding of the language and the relevant context which choice to make. Ideally, a judge using a dictionary to construe a statute would identify and explain the reasoning behind each choice. A modern judge construing an old statute with the help of an old dictionary will not have the same intuitive sense of the language of the statute and dictionary; therefore, the modern judge's explanation of the reasons motivating each decision is all the more necessary. Although a rigid, predetermined system—like always choosing the oldest meaning of a word—would be illogical, a subsequent explanation and justification of each decision would be especially valuable when it is an old dictionary that the judge uses.

b. *Acontextual*

Dictionaries, by their very nature, do not provide the precise meaning of a word as it is used in a particular context.[258] Rather, it is for the user to adjust the dictionary's definition to the context in a manner that makes sense.[259] This aspect of dictionary definitions is of even greater significance in older dictionaries. Indeed, Samuel Johnson acknowledges this inevitable shortcoming in the preface to his *Dictionary of the English Language*:

> [I]t must be remembered, that while our language is yet living, and variable by the caprice of every one that speaks it, these words are hourly shifting their relations, and can no more be ascertained in a dictionary, than a grove, in the agitation of a storm, can be accurately delineated from its picture in the water.[260]

The mechanical application of a dictionary definition to a word in a statute may result in an awkward interpretation,[261] an awkwardness that may be compounded when the dictionary and statute are old.

Some large, modern dictionaries provide the user with quotations and examples illustrating the use of a word in the quoted context, thereby ameliorating somewhat the acontextualism of dictionary definitions. Both the *OED2* and the *WNID3*, for example, include many examples or illustrative quotations containing the headword with different meanings in an array of contexts. Such quotations and examples provide the reader with some assistance in understanding

258. *Supra* Part II.B.2.

259. *See* Zgusta, *supra* note 218, at 264.

260. Johnson, Dictionary, *supra* note 56, at preface.

261. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 462 (1991) (holding that LSD in blotter paper is a "mixture" based on dictionary definitions of "mixture"). See Lawrence Solan, *When Judges Use the Dictionary*, 68 Am. Speech 50 (1993), for a critique of the Court's use of dictionaries in this case.

some of the "different contextual nuances" of a word.[262] With the aid of these illustrative quotations, the reader can develop a better sense of what the word might mean in the relevant context.[263]

Old dictionaries, however, do not provide the reader with the same sort of illustrative quotations that new dictionaries contain. Many significant old dictionaries provide no quotations at all. Justices frequently refer to Thomas Sheridan's[264] and John Kersey's[265] dictionaries, for example, neither of which has illustrative examples or quotations. This absence of illustrative, contextual uses of the word to guide the user makes the use of definitions from old dictionaries even more problematic.

Some older dictionaries, including Webster's 1869 *An American Dictionary of the English Language*[266] and Worcester's *Dictionary of the English Language*,[267] do provide quotations; however, because of the prescriptive nature of older dictionaries,[268] those quotations that are provided are of considerably less assistance to the reader.[269] Indeed, a substantial number of the quotations in Webster's 1869 *An American Dictionary of the English Language* come from poetry composed centuries before the dictionary was compiled.[270] Johnson's express "purpose was to admit no testimony of living authours";[271] accordingly, his quotations were also quite dated at the time of publication. These sorts of poetic and archaic quotations provide little assistance to the reader and place high demands on the reader's "abstractive powers."[272]

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262. Zgusta, *supra* note 218, at 263.

263. *See id.* at 264 ("[The lexicographer] indicates only some examples which he considers typical and leaves it to the abstractive power of the user of the dictionary to form other combinations by analogy.").

264. Thomas Sheridan, A General Dictionary of the English Language (facsimile reprint 1967) (London, 1780); *e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 638 n.20 (1997) (Thomas, J., dissenting); Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting).

265. John Kersey, Dictionarium Anglo-Britannicum (facsimile reprint 1969) (London, 1708); *e.g.*, United States v. Hubbell, 530 U.S. 27, 50 (2000) (Thomas, J., concurring); Austin v. United States, 509 U.S. 602, 614 n.7 (1993).

266. *Supra* note 241.

267. *Supra* note 80.

268. *Supra* notes 20-80 and accompanying text.

269. The *WNID3* provides twelve examples of the adjective "wanton" with various meanings in different contexts, and the *OED2* gives approximately sixty quotations. WNID3, *supra* note 17, at 2575; 19 OED2, *supra* note 56, at 882-83. Worcester provides eight examples, all from Shakespeare, Milton, Addison, Roscommon, and the New Testament (King James). Worcester, *supra* note 80, at 1645. Webster's 1869 dictionary has nine quotations, all from Shakespeare, Milton, Addison, Roscommon, and Spencer (five of the quotations are the same as Worcester's). Webster (1869), *supra* note 241, at 1490. See the Appendix, *infra*, for examples.

270. *See supra* note 269.

271. Johnson, Dictionary, *supra* note 56, at preface.

272. *Supra* note 263. A striking example is a quotation Johnson supplies for "excise": "*Excise*,/With hundred rows of teeth, the shark exceeds,/And on all trades like Cassawar she feeds." Johnson, Dictionary, *supra* note 56.

Further, the illustrative quotations in old dictionaries may be of small use even given analogous contexts. Johnson, for example, was not particularly concerned with quoting his authorities accurately. Rather, he would alter the quotation so that it conveyed the meaning he wanted it to.[273] Johnson also chose the sources of his quotations carefully in accordance with his political views. For example, Jonathon Green observes that Johnson never quotes Thomas Hobbes in his dictionary. However, Hobbes does appear "in quotations in which he is systematically refuted."[274] Quotations such as these have the potential of misleading a modern reader.

It is naive to expect a dictionary to convey the precise sense of a word as it is used in a particular context. Modern dictionaries that include illustrative quotations do assist the user in understanding some of the contextual nuances of a word. Old dictionaries, however, often do not provide such assistance, and when they do, it is often ineffective. Thus, the inability of dictionaries to convey the contextual meaning of a word is even more problematic in old dictionaries.

2. Intrinsic Characteristics of All Dictionaries that Become Problematic in Old Dictionaries

Certain characteristics intrinsic to all dictionaries in general make them poor tools for discovering an earlier understanding of a word. First, dictionaries are made by copying earlier dictionaries, thereby preserving archaic words and definitions. Second, as Aprill comments, the publication date of a dictionary does not necessarily correspond to the date of the edition,[275] an observation that takes on added magnitude in the publication of older dictionaries. Third, dictionaries are inherently conservative and therefore may not accurately describe the current meaning of a word. This conservatism is even more pronounced in older dictionaries. Although all dictionaries, new and old alike, share these characteristics, the effects of these characteristics are more profound when an old dictionary is used to interpret an old statute.

a. *Copying*

Lexicographer Sydney Landau[276] writes that "[t]he history of

273. Green, *supra* note 40, at 266. "If Johnson didn't like a quote, he changed it. He would omit an opening phrase or amputate a conclusion and if a phrase didn't convey the meaning he required, he had no scruples in rewriting it. Nothing was sacred." *Id.*

274. Green, *supra* note 40, at 267.

275. Aprill, *supra* note 175, at 327.

276. Editor of *The Cambridge Dictionary of American English* (2000), *The Chambers English Dictionary* (1992), *The Doubleday Dictionary for Home, School, and Office* (1975), and *International Dictionary of Medicine and Biology* (1986).

English lexicography usually consists of a recital of successive and often successful acts of piracy."[277] This dependence on piracy or copying is a characteristic shared by all dictionaries, new and old alike.[278] Dependence on earlier dictionaries makes dictionaries poor historical tools because the practice of copying perpetuates the inclusion in dictionaries of words and meanings no longer current at the time the dictionary was created.

The development of law dictionaries exemplifies this perpetuation of archaisms. For example, Mellinkoff traces dictionary occurrences of the word "doit"/"doitkin," a coin outlawed in 1416,[279] from John Cowell's seventeenth-century law dictionary[280] through twentieth-century Ballantine's and Black's law dictionaries.[281] Similarly Mellinkoff records that almost all the terms in John Rastell's 1527 *Expositiones Terminorum Legum Anglorum* survive in twentieth-century law dictionaries, although the terms are now "largely unused. Their law is long dead."[282] The words have survived for so long in legal dictionaries for no other reason than that they had existed in earlier legal dictionaries. Because lexicographers copy from earlier dictionaries, dictionaries contain words and definitions that were not current at the time the dictionary was published, potentially misleading the modern dictionary user.

b. *Editions and Publication Dates*

Supreme Court Justices are sometimes very scrupulous about choosing the dictionary and edition with a publication date close to the date the statute was enacted;[283] yet, this practice is often of deceptively limited value.[284] This practice is of even less value when old dictionaries are used because some popular older dictionaries were not only reprinted but even appeared in new editions without any substantive change to the body of the dictionary.

The editions of Johnson's *A Dictionary of the English Language* provide a fine example of this practice. Five editions of Johnson's

277. Landau, *supra* note 21, at 43; *see* Worcester, *supra* note 80, at iii, vi; *supra* notes 107-14 and accompanying text.

278. *See supra* note 107.

279. Mellinkoff, *supra* note 32, at 428-29.

280. *Id.* at 428, n.18.

281. *Id.* at 435. "Doitkin" appears recently to have lost currency. The sixth edition of Black's contains the word, but the seventh does not. Black's Law Dictionary 483 (6th ed. 1990) (including "doitkin"); Black's Law Dictionary 499 (7th ed. 1999) (including neither "doit" nor "doitkin").

282. Melinkoff, *supra* note 32, at 427.

283. *E.g.*, MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (referring to Webster's Second New International Dictionary (1934) in interpreting a 1934 statute).

284. *Supra* notes 122-24 and accompanying text.

dictionary appeared in his lifetime.[285] The second edition, according to Sledd and Kolb, is "essentially a reprint of the first," and the third edition is largely a reprint of the second.[286] In revising the dictionary for the fourth edition, Johnson stated that "[s]ome superfluities I have expunged, and some faults I have corrected."[287] In his advertisement for the fourth edition, he wrote that he had "endeavoured, by a revisal, to make [the dictionary] less reprehensible."[288] There is no indication that he attempted to update the dictionary. It is even unclear how many of the revisions that Johnson made were actually incorporated into the fourth edition.[289] The fifth edition of the dictionary, published in 1784, Sledd and Kolb call "an unimportant reprint of the fourth."[290] The sixth and seventh editions, published posthumously, incorporate some two hundred "light[]," "casual[]" changes Johnson made to the fourth edition,[291] few of which Sledd and Kolb find to have "any particular significance."[292] These two editions of Johnson's *Dictionary*, published within a month of one another, otherwise differ from each other only in format: the sixth edition is two volumes quarto and the seventh is a single volume folio.[293] Thus, at least in the case of Johnson's dictionary, not only was there often no change in substance in successive editions, but when there was, there is no indication that the changes were made to update the dictionary rather than simply to refine style and correct error. Accordingly, judges who carefully choose the printing or edition of an old dictionary that is most closely contemporary with the statute risk relying on a dictionary the substance of which far antecedes the statute.

c. *Lexicographical Conservatism*

The inherent chronological conservatism of dictionaries[294] is aggravated when dictionaries are used as historical tools. It is of no small significance that modern dictionaries advertise the number of new words they contain.[295] Earlier lexicographers like Worcester, Stormonth, and Johnson had no desire to make their dictionaries

285. James H. Sledd & Gwin J. Kolb, *The Early Editions of the* Dictionary, *in* Dr. Johnson's Dictionary: Essays in the Biography of a Book 105, 127 (1955).
286. *Id.* at 111.
287. *Id.* at 115.
288. *Id.* at 114.
289. *Id.* at 116.
290. *Id.* at 127.
291. *Id.* at 131.
292. *Id.* at 132.
293. *Id.* at 128.
294. *Supra* notes 115-21 and accompanying text.
295. *E.g.*, AHD4, *supra* note 38, at viii (claiming "nearly 10,000 new words"); Random House Webster's Unabridged Dictionary vii (2d ed. 1997) (claiming "60,000 new entries and 75,000 new definitions").

appear progressive—rather, their goal was that their dictionaries appear authoritative and conservative.[296] The inherently conservative nature of dictionaries is thus compounded by the lexicographer's intentional conservatism. The illustrative quotations Worcester and Webster provide with their definitions evince this compounded conservatism. Many of these quotations were centuries old even at the time the dictionaries were published.[297] A judge, seeking in an old dictionary the meaning of a word at the time the statute was enacted, may unwittingly apply a meaning that had become archaic well before the statute was enacted.

These characteristics of dictionaries, although typical of dictionaries in general, become pertinent only when a dictionary is used to determine the meaning of a word at a particular time in the past. Judges referring to a modern dictionary may rely on their experience with the language to help them differentiate between the modern and archaic words and meanings. However, when the language is removed in time, judges cannot rely on the same innate understanding of the language; therefore, judges are likelier to be misled by archaic words and meanings appearing in older dictionaries.

3. Problems Unique to Old Dictionaries

Characteristics unique to old dictionaries create problems when old dictionaries are used to determine an earlier understanding of a word. These problems are largely a result of the form and intended function of older dictionaries. First, and perhaps most significantly, the lexicographers typically did not intend their dictionaries to convey the common, contemporary meaning of a word.[298] Second, lexicographers once strove less for detachment than they do now. Accordingly, older dictionaries may be tainted by the lexicographers' partial views, sometimes in ways that may not be obvious to the modern reader.[299] Finally, and perhaps most obviously, if a modern reader has difficulty understanding the language of an old statute, the reader may also have difficulty understanding the language of an old dictionary. These problems make old dictionaries less appealing tools for interpreting old statutes.

a. *Linguistic Prescriptivism*

The most significant problem with the use of old dictionaries in statutory interpretation is that the creators of these dictionaries did not aim to report the common understanding of the word. Rather,

296. *See supra* notes 40-42, 68-80 and accompanying text.
297. *See supra* note 269 and accompanying text.
298. *Supra* notes 20-80 and accompanying text.
299. *Supra* notes 48-63 and accompanying text.

whether for political or ideological-linguistic reasons, many earlier lexicographers intended their dictionaries to be prescriptive.[300] Judges therefore should not blindly trust these dictionaries to provide the common, contemporary meaning of a word.

One of the effects of this prescriptive lexicography is that these dictionaries were intended to be rife with obsolete words and meanings—words and meanings lexicographers hoped to restore to the language. Bailey, in his 1721 *Universal Etymological English Dictionary* and 1730 *Dictionarium Britannicum*, included then-obsolete terms.[301] Even more problematically, Johnson intentionally excluded usage examples from "living authours."[302] Although Johnson decided to exclude most "antiquated or obsolete words," he proposed to include those that were used by the author with "propriety, elegance, or force."[303] Thus a word or meaning may appear in Johnson's dictionary, not because it was widely used, but simply because an author had used the word or meaning in a way that appealed to Johnson's aesthetics. A modern judge, turning to one of these dictionaries with the goal of discovering the contemporary meaning of a word, may instead unwittingly apply to a word a meaning it had not borne for centuries.

b. *Political Lexicography*

Politics made their way into dictionaries in the eighteenth and nineteenth centuries far more frequently than they do today.[304] The contents of dictionaries reflected not only linguistic politics but also unabashed partisan politics. Indeed, sometimes the definitions in old dictionaries provide a better sense of the lexicographer's political views than they do of the common contemporary understanding of a word. In some cases, the influence of the lexicographer's personal beliefs may be discrete enough to elude the modern judge but significant enough to affect the outcome of a case.

Yet, ignoring Johnson's linguistic and nationalistic prejudices—including his scorn for American English and his refusal to record it[305]—Justices of the United States Supreme Court have relied on Johnson's dictionary in twenty opinions to provide the contemporary, presumably American, understanding of a word.[306] In seventeen of

300. *Supra* notes 20-80 and accompanying text.
301. Landau, *supra* note 21, at 53-54, 56.
302. Johnson, Dictionary, *supra* note 56, at preface.
303. Johnson, Plan, *supra* note 69, at 28.
304. *See supra* notes 48-63 and accompanying text.
305. *See supra* notes 53-56 and accompanying text.
306. Eldred v. Ashcroft, 123 S. Ct. 769, 778 (2003); *id.* at 804 (Breyer, J., dissenting); Utah v. Evans, 122 S. Ct. 2191, 2205 (2002); *id.* at 2214 (Thomas, J., concurring in part and dissenting in part); INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting); Dep't of Commerce v. United States House of

these twenty opinions, Johnson's dictionary is used to interpret the United States Constitution.[307] Every time the Supreme Court uses Johnson's dictionary to interpret the Constitution, it risks incorporating Johnson's anti-American sentiments into American Constitutional jurisprudence.[308] Every time modern judges rely on these old dictionaries, they risk deciding a case on the basis of outdated politics and prejudices.

c. *Unintelligible Dictionaries*

A final problem facing the modern judge using an old dictionary is the lack of an intuitive understanding of the language. Indeed, this problem seems obvious: if the change of the meaning of words makes a statute potentially inaccessible, why should the definition in a contemporary dictionary be any more accessible? Yet judges do assume they understand dictionaries contemporary with a statute, the language of which they assume they cannot understand.

Such a problem appears in Justice Rehnquist's dissent in *Smith v. Wade*.[309] Rehnquist relied on dictionaries contemporary with the enactment of the Civil Rights Act of 1871 to demonstrate that the word "wanton," as used in the standard for awarding punitive damages, indicated the existence of malice or actual ill will.[310] Rehnquist found the word "lewdly" in the definition of "wantonly," and in the definition of "lewdly" he found "wickedly."[311] Based on this definition daisy chain, he concluded that "wantonly" "would have

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Representatives, 525 U.S. 316, 347 (1999) (Scalia, J., concurring in part); United States v. Bajakajian, 524 U.S. 321, 335 (1998); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 637 n.20, 638 (1997) (Thomas, J., dissenting); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 858 n.7 (1995) (Thomas, J., dissenting); United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); Nixon v. United States, 506 U.S. 224, 229-30 (1993); County of Allegheny v. ACLU, 492 U.S. 573, 648, 649 n.5 (Stevens, J., concurring) (1989); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 295 (1989) (O'Connor, J., dissenting in part); Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 536 (1952) (Frankfurter, J., concurring); Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 535 (1903); Patton v. Brady, 184 U.S. 608, 619 (1902); Keck v. United States, 172 U.S. 434, 461 (1899) (Brown, J., dissenting); Enfield v. Jordan, 119 U.S. 680, 684 (1887); Legal Tender Cases, 79 U.S. 457, 584 (1870) (Chase, C.J., dissenting).

307. Only in *Joseph Burstyn, Inc.*, 343 U.S. at 536, *Keck*, 172 U.S. at 461, and *Enfield*, 119 U.S. at 684, is Johnson's dictionary used for a purpose other than interpreting the Constitution.

308. Johnson was not the only lexicographer to express his political biases in his dictionary. *See supra* notes 48-52 and accompanying text.

309. 461 U.S. 30, 60 n.3, 64 (1983) (Rehnquist, J., dissenting).

310. The word "wanton" does not appear in the statute, but Rehnquist seeks the contemporary meaning of the word because it appears in cases contemporary with the enactment of the statute as part of the standard for awarding punitive damages. *Id.* at 64.

311. *Id.* at 60 n.3.

been understood by laymen to require some sort of evil or dissolute intention."[312]

"Dissolute," yes, but "evil" only in the same sense, not in a sense requiring ill will: Rehnquist here appears to have misunderstood the sexual and moral connotations those dictionaries attribute to the words.[313] Worcester, for example defines the adjective "wanton" as "[d]issolute; licentious; lewd; lustful; lascivious; libidinous; lecherous."[314] A closer reading of this full definition does not support the conclusion that "wanton" meant "malicious." Here, it appears, Justice Rehnquist may have found the dictionary more obscuring than illuminating.

Cass Sunstein has commented that excessive reliance on dictionary definitions in general can result in "interpretive blunders."[315] Excessive reliance on old dictionaries poses additional problems: a new textualist judge who seeks in an older dictionary the common contemporary understanding of a word runs the risk of attaching to the word a meaning it no longer bore at the time the statute was enacted. Likewise, the judge who relies on old dictionaries may miss the most appropriate meaning of a word simply because the lexicographer disapproved of that use. Furthermore, by relying on these dictionaries, a judge risks incorporating into our law political, philosophical, and linguistic views long since rendered irrelevant. Finally, the judge may simply misunderstand the dictionary and apply to the statute a meaning not supported by the dictionary.

For the reasons discussed above, old dictionaries are not the tools some judges understand them to be. Old dictionaries should be used with a good deal of caution and careful reflection. Because of the limited scope of many of the definitions in older dictionaries, the absence of a particular definition in a dictionary should not be taken to indicate that that definition was not prevalent at the time the dictionary was published.[316] On the other hand, the presence of a particular definition does not necessarily indicate that that definition was widely used, or even that it was still current, at the time of the

312. *Id.* Rehnquist's method—creating a chain of definitions—raises some problems of its own. Because of the semantic breadth of some words, the additional step can permit great mischief. For example, "wantonly," in its definition in the *OED2*, can mean "wilfully," which in turn once bore the meaning "with good will." 19 OED2, *supra* note 56, at 883; 20 OED2, *supra* note 56, at 339. This creates an uncomfortable standard for awarding punitive damages.

313. See the Appendix, *infra*, for the full definitions Justice Rehnquist referred to. It is telling that Webster defines "whoremaster" as "[a] man who practices lewdness." Webster (1869), *supra* note 241, at 1513.

314. Worcester, *supra* note 80, at 1645.

315. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 417 (1989).

316. As occurs in, for example, *Eldred v. Ashcroft*, 123 S. Ct. 769, 778 (2003) (confining the meaning of "limited" in the Copyright Clause of the Constitution to existing dictionary definitions).

dictionary's publication.[317] A new textualist judge, relying on the definition in an old dictionary, may unwittingly attribute to an old statute a meaning it never bore. Thereby, in an effort to avoid applying the rule of man rather than the rule of law,[318] the new textualist judge may simply avoid applying any rule.

B. *A Usage Based Method*

Dictionaries are not the only method used with hopes of discovering the contemporary meaning of words in an old statute. Even within the new textualist framework, there are other means of finding the contemporary, common understanding of a word in a statute. As meaning is determined by usage, not by dictionaries, usage can provide an understanding of meaning.

In his dissent in *Moskal v. United States*,[319] Justice Scalia took a usage based approach to determine the former meaning of a word. The Supreme Court's *Moskal* decision turned on the meaning of the phrase "falsely made" in the National Stolen Property Act, the relevant portion of which was enacted in 1939.[320] The Court held that the term "'falsely made' encompasse[d] genuine documents containing false information."[321] In his dissent,[322] Justice Scalia looked at the phrase "falsely made" as it appeared in earlier and contemporary state statutes,[323] earlier and contemporary state and federal court decisions,[324] and contemporary legal commentary.[325] From these sources, Scalia extracted the meaning of the phrase in the legal language of the time.[326] Scalia concluded that "[a] forged memorandum is 'falsely made'; a memorandum that contains erroneous information is simply 'false.'"[327]

This sort of usage based approach could provide a more accurate, less biased understanding of the way the word was used in writing at the relevant time. Such an approach allows the judge to see how the word functions in a statutory or other legal context. The judge sees

317. As occurs in, for example, *Nixon v. United States*, 506 U.S. 224, 230 (1993) (reasoning, based on dictionary definitions, that the term "try" has considerably broader meanings than commonly understood).

318. *See* Scalia, *supra* note 133, at 17.

319. 498 U.S. 103, 119-32 (1990) (Scalia, J., dissenting).

320. *Id.* at 105, 110, 123 (Scalia, J., dissenting).

321. *Id.* at 110 (Scalia, J., dissenting). Justice Scalia summarized the Court's holding: "The Court's decision rests ultimately upon the proposition that, pursuant to 'ordinary meaning,' a 'falsely made' document includes a document which is genuinely what it purports to be, but which contains information that the maker knows to be false." *Id.* at 119 (Scalia, J., dissenting).

322. *Id.* at 119-32 (Scalia, J., dissenting).

323. *Id.* at 123-24 (Scalia, J., dissenting).

324. *Id.* at 124 (Scalia, J., dissenting).

325. *Id.* at 125 (Scalia, J., dissenting).

326. *Id.* at 121 (Scalia, J., dissenting).

327. *Id.* at 119 (Scalia, J., dissenting).

the word without having to rely on another's interpretation of the word, and the judge need not be concerned about a lexicographer's biases, linguistic or otherwise, affecting the interpretation of the word and statute. With such an approach, the judge acts as his own lexicographer, not in the sense that he attributes to a word a particular meaning, but in the sense that he examines evidence that will allow him to describe the way a word is used and then apply that description to the question confronting him.

This alternative, however, is plagued by some of the very problems that textualists hope to avoid by using dictionaries: in choosing sources, the judge must make a series of interpretive choices. Such choices of sources are not dissimilar to the choices an intentionalist judge makes when determining which components of a legislation's history to refer to. The new textualists seek to avoid such judicial freedom.

A return to the "commerce" chestnut and Thomas's *Lopez* concurrence provides an example of the interpretive freedom a judge may have in examining actual usage.[328] In his concurring opinion to *United States v. Lopez*, Justice Thomas found the original understanding of "commerce" limited to "selling, buying, and bartering, as well as transporting for these purposes."[329] He supported his definition largely with dictionaries contemporary with the Constitution.[330] As noted above, Thomas's was not the last word on the subject.[331] Of course, it also was not the first.

William Crosskey, for one, finds a much broader meaning for "commerce" as the word was used at the time of the framing.[332] Crosskey supports this definition with a broad survey of old dictionaries, and, more prominently, with occurrences of the word "commerce" in sources like newspapers, pamphlets, correspondences, treatises, and legislative debates, amongst others.[333] In this wide-ranging examination of usage, Crosskey finds a broad definition of "commerce" that conflicts with Thomas's.

Grant Nelson and Robert Pushaw, Jr.,[334] using Crosskey's research as a foundation,[335] challenge Thomas's conception of the original understanding of "commerce."[336] Nelson and Pushaw define

328. *See supra* notes 2-5 and accompanying text.
329. United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring).
330. *See id.* (Thomas, J., concurring); *see also supra* note 8 and accompanying text.
331. *See supra* notes 9-15 and accompanying text.
332. William Winslow Crosskey, 1 Politics and the Constitution in the History of the United States 50-292 (1953).
333. *See id.*
334. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1 (1999).
335. *Id.* at 13 n.50.
336. *See id.* at 6.

commerce as "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests."[337] They find extra support for Crosskey's definition in old dictionaries, including Johnson's,[338] as well as in the roughly contemporary usages of Englishmen like Daniel Defoe, Adam Anderson, Adam Smith, and Malachy Postlethwayt[339] and Americans like James Wilson, Alexander Hamilton, John Dickinson, and members of the First Continental Congress.[340]

Randy E. Barnett, however, disagrees with Nelson and Pushaw's definition of "commerce" and endorses instead Thomas's narrower definition for the word.[341] Barnett supports his narrower definition of "commerce" in much the same way Nelson and Pushaw support their broad understanding: he finds usages in the records of the Constitutional Convention,[342] state ratification debates,[343] and *The Federalist Papers*.[344] In these sources, Barnett finds "commerce" to be used exclusively in the narrower sense.[345]

Barnett also objects to Crosskey's methodology and to Nelson and Pushaw's failure to remedy what Barnett sees as a defect in Crosskey's method.[346] Crosskey intended to exclude sources connected with the Constitution so as to minimize the chances of contemporary political biases affecting his results.[347] Accordingly, Crosskey excluded occurrences of "commerce" in Madison's notes from the Constitutional Convention, one of the pillars supporting Barnett's definition.[348] Barnett, on the other hand, sought evidence "of how persons used words when discussing the particular text at issue."[349] Because Barnett attaches value to a type of source that Crosskey and Nelson and Pushaw reject, he finds a contemporary understanding of the word "commerce" contrary to Crosskey's.[350]

As these conflicting definitions of "commerce" illustrate, the result

337. *Id.* at 9.
338. *Id.* at 15 n.53.
339. *Id.* at 14-19.
340. *Id.* at 19-21.
341. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L.Rev. 101, 103-04 (2001).
342. *Id.* at 114-15.
343. *Id.* at 116-25.
344. *Id.* at 115-16. Of course, Barnett also relies on Samuel Johnson's *A Dictionary of the English Language*. *Id.* at 113-14.
345. *Id.* at 104.
346. *Id.* at 104-05.
347. Crosskey, *supra* note 332, at 5-6. Thurston Greene had similar intentions for his "compilation of documents and quotations from authenticated original sources available to the framers, the Congress, and the ratifiers." Thurston Greene, The Language of the Constitution, at xvii (1991). Accordingly, he also excludes James Madison's non-public notes of the Constitutional Convention debates. *Id.*
348. *See* Barnett, *supra* note 341, at 114-15.
349. *Id.* at 107.
350. *Id.* at 104-05.

of the sort of analysis Justice Scalia undertook in his *Moskal* dissent is rarely as clear as new textualist judges may desire. This ambiguity is largely a result of the various interpretive choices the reader must make. The reader or judge must not only interpret the meaning of the word as it appears in the sources; the judge must also identify the permissible sources. The broad range of available sources and the various possible readings of each occurrence of the word force the judge to make a series of interpretive decisions. Further, the range of sources and readings also gives the judge tremendous discretion to, as the late Judge Harold Leventhal said in reference to searching legislative history, "look over the heads of the crowd and pick out your friends."[351] This discretion is one of the evils Scalia seeks to avoid by eschewing legislative history.[352]

At least some of these interpretive difficulties can be avoided, however. As Geoffrey Nunberg suggests, the judge seeking the common understanding of a term as reflected across the range of specificities may find value in a large, computer-searchable corpus of texts such as Nexis.[353] A corpus that is sufficiently broad and diverse will have a wide enough sampling of texts to afford, with manipulation and linguistic analysis, a representative sense of a word's possible meanings.[354] Clark D. Cunningham, Judith N. Levi, Georgia M. Green, and Jeffrey P. Kaplan used such an approach in determining the current, ordinary meaning of "enterprise" as it appears in the RICO statute.[355] The linguists amongst the authors searched Nexis to identify the range of usages of the word.[356] The linguists then analyzed the results and categorized them grammatically and semantically.[357] The information from this research provided the

351. Scalia, *supra* note 133, at 36 (paraphrasing Judge Leventhal).

352. *See id.* Even when the textualist has decided which sources to use, this approach continues to pose difficulties. Particularly, if time has rendered a word in the subject statute opaque, the same word in other contemporary statutes may be no easier to understand. The same may hold true for contemporary commentary, case law, or newspaper articles. If a contemporary dictionary entry is difficult to understand, surely contemporary legal commentary is not considerably more accessible. *See supra* notes 312-13 and accompanying text.

353. Geoffrey Nunberg, *High Definition*, American Lawyer 47, 48 (Jan. 2003).

354. *See* Douglas Biber, *Investigating Language Use Through Corpus-Based Analyses of Associated Patterns*, *in* Usage-Based Models of Language 287, 288 (Michael Barlow & Suzanne Kemmer eds., 2000).

355. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1596-98 (1994) (reviewing Lawrence M. Solan, The Language of Judges (1993)).

356. *See id.*

357. *See id.* First, the linguists broke the occurrences of "enterprise" into two grammatic categories: mass nouns and count nouns. *Id.* at 1596. They focused on the count nouns, which they broke into two semantic categories: occurrences of "enterprise" denoting an activity and occurrences denoting an entity. *Id.* at 1597. They concluded that the RICO statute, which specified particular types of entities, must have been intended to include only the "entity" meaning of the "enterprise." *Id.* The linguists found that all the examples of enterprise as entities could be characterized as having some sort of goal but that this goal need not be profit. *Id.*

backbone for their investigation.[358]

However, for practical reasons this method may be less valuable in determining the former meaning of a word. There now exist few historical, electronic corpora.[359] Those historical corpora that are computer-searchable do not provide the degree of chronological specificity the pursuit demands.[360] Until this deficit is supplied, the approach taken by Cunningham, Levi, Green, and Kaplan is not practicable for old statutes.

The new textualist judge is then left with little recourse but to compile a collection of sources sufficiently broad-based to overcome some of the interpretive problems.[361] However, to collect, sort through, and extract examples from these sources requires a considerable amount of time, energy, and, not least, expertise. Then remains the imposing task of analyzing the results—a task which, for one word, took the experienced editors of the *Oxford English Dictionary* over one month.[362] The modern "intelligent and informed"[363] person, faced with these obstacles, may prefer to climb Nero's pillar if only the law then might easily be read.[364]

CONCLUSION

Ultimately, it may be that dictionaries and usage based inquiries allow judges less freedom and discretion while providing greater accuracy in construing statutes or the Constitution than do sources like legislative history. However, like the falsified committee reports that concern Justice Scalia, dictionaries—particularly old dictionaries—may contain information that could mislead the judge who seeks the common, contemporary understanding of a statute. And, like legislative history, dictionaries require that judges make interpretive choices.

These results are not consistent with the definition the Seventh Circuit had applied to "enterprise": "an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity." *Id.* at 1589 (quoting Nat'l Org. for Women v. Scheidler, 968 F.2d 612, 627 (7th Cir. 1992)) (citations omitted). This result is also inconsistent with the plaintiff's dictionary-driven claim that in "its normal usage, 'enterprise' includes virtually any type of organized venture." *Id.* at 1590 (citations omitted).

358. Based on this information, Cunningham et al. created a survey questionnaire, which they distributed to university students and federal district court judges. *Id.* at 1598-99.

359. Landau, *supra* note 21, at 321.

360. *See id.* at 321-22.

361. Sourcebooks like Greene's, *supra* note 347, may provide a starting point.

362. It took the editors and staff of the Oxford English Dictionary over forty days to sort through and digest all the collected examples of the word "set." 1 OED2, *supra* note 56, at xliii.

363. Scalia, *supra* note 133, at 38.

364. *See supra* note 158 and accompanying text.

However, that is not to say that dictionaries cannot be used effectively in determining the contemporary, common understanding of statutes. Although an old dictionary cannot conclusively establish the meaning of a word at the time the dictionary was published, old dictionaries can provide a useful starting point in determining the contemporary meaning of a word. But, when referring to a dictionary, a judge should acknowledge that the dictionary provides only a single, refutable, piece of evidence. And, because reference to a dictionary requires that the judge make a series of interpretive choices, the judge should explain those choices.

The judge can check the evidence the dictionary provides against a brief yet broad survey of contemporary usage. The purpose of this shallow survey should be to test the dictionary definition; judges should not hand pick usage examples for the purpose of shoring up dictionary-driven arguments.[365] The quick survey may satisfy the judge, or it may convince the judge that a more thorough study is required. The judge should strike the appropriate balance. Again, the judge should acknowledge the various interpretive decisions inherent in the process. From the evidence provided by the dictionaries and the survey of usage, combined with the contextual evidence the statute yields, the judge likely can induce an accurate description of the contemporary, common understanding of a word in a statute while not forsaking entirely the tenets of the new textualism.

365. *Cf. supra* note 8.

APPENDIX

Complete dictionary entries for Rehnquist's "wantonly" argument in his *Smith v. Wade* dissent.[366] Pronunciation and etymological information have been omitted.

Joseph E. Worcester, *Dictionary of the English Language* (Boston, 1860):

WANTONLY . . . , *ad.*
In a wanton manner; sportively, or laciviously. *Dryden.*[367]

WANTON . . . , *a.* . . .
1. Wandering; flying or moving loosely.
She as a veil down to the slender waist
Her unadorned golden tresses wore,
Dishevelled, but in *wanton* ringlets waved. *Milton.*
2. Sportive; frolicsome; playful.
A wild and *wanton* herd. *Shak.*
I have ventured,
Like little, *wanton* boys, that swim on bladders,
This many summers in a sea of glory. *Shak.*
3. Dissolute; licentious; lewd; lustful; lascivious; libidinous; lecherous.
A *wanton*, ambling nymph. *Shak.*
Men grown *wanton* by prosperity. *Roscommon.*
Ye have lived in pleasure . . . and been *wanton.* *Jas.* v. 5.
4. Loose; unrestrained; unchecked; free.
How does your tongue grow *wanton* in her praise! *Addison.*
5. Luxurious; superfluous; exuberant.
What we by day lop overgrown,
One night or two with *wanton* growth derides. *Milton.*[368]

LEWDLY . . . *ad.*
1. †Ignorantly; not learnedly; illiterately. *Chaucer.*
2. Wickedly; sinfully.
Yet *lewdly* dar'st our ministering upbraid. *Milton.*
3. Lustfully; lecherously. *Ezek.* xxii.11.[369]

LEWD . . . , *a.* . . .
1. †Ignorant; illiterate; unlearned. *R. Brune.*

366. Smith v. Wade, 461 U.S. 30, 60 n.3 (1983).
367. Worcester, *supra* note 80, at 1645.
368. *Id.*
369. *Id.* at 834.

2. Beguiled; wicked; unprincipled.

Lewd fellows of the baser sort. *Acts* xvii. 5.

3. Misled by lust; given to the irregular indulgence of animal desire; lustful; lecherous; libidinous; salacious. *Dryden.*

Whatsoever is light and frothy, and much more whatever is *lewd* and filthy, ought to be banished from the conversation of Christians. *Tillotson.*

. . . "That *lewd*, which meant at one time no more than lay or unlearned (the *lewd* people, the lay people), should come to signify the sinful, the vicious, is not a little worthy of note." *Trench.*[370]

WICKED, *a*. . . .

1. Evil in principle or practice; vicious; unjust; nefarious; irreligious; impious; flagitious; sinful; profane; immoral; heinous; iniquitous; bad;—used both of persons and things.

There the *wicked* cease from troubling. *Job* iii. 17.

He of their *wicked* ways shall them admonish. *Milton.*

Committing to a *wicked* favorite [Sejanus]
All public cares, and yet of him suspicious. *Milton.*

2. †Mischievious; pernicious; baneful.

As *wicked* dew as e'er my mother brushed
With raven's feather from unwholesome fen
Drop on you both. *Shak.*

Syn.—*Wicked* is applied to any moral evil in character or action. *Wicked* and *sinful* are mostly applied to offences against the laws of God. A *wicked* or *sinful* action; *profane* language; an *irreligious* or *impious* person or character; an *unjust* proceeding; a *vicious* practice; *flagitious* conduct; *heinous* crime; *iniquitous* fraud.—See base, heinous.[371]

WICKEDLY, *ad.* In a wicked manner; criminally; viciously; sinfully; corruptly. *Pope.*[372]

370. *Id.*
371. *Id.* at 1669.
372. *Id.*

James Stormonth, *A Dictionary of the English Language* (New York, 1885):

> WANTON, a.... unrestrained; loose; indulging the natural appetites; disposed to lewdness; running to excess; reckless; lively or sportive, as 'the *wanton* wind'; quick and of irregular motions; in *OE.*, luxurious; superfluous; not regular ... WANTONLY, ad....: lewdly; without restraint; loosely[373]

> LEWD, a.... given to lustful indulgence; dissolute; licentious; impure; in *OE.*, inferior; bad: LEWDLY, ad....[374]

> WICKED, a.... addicted to vice; immoral; sinful; evil in principle or practice; bad or baneful in effect; addicted to mischief; mischievious... WICKEDLY, ad....—syn. of 'wicked': bad; evil; naughty; corrupt; vicious; iniquitous; criminal; guilty; unjust; unrighteous; unholy; irreligious; ungodly; profane; atrocious; nefarious; pernicious; abandoned; flagitious; flagrant; profligate; heinous; base; villanous; impious; cursed; baneful.[375]

373. Stormonth, *supra* note 240, at 1146.
374. *Id.* at 555.
375. *Id.* at 1160.

Noah Webster, *An American Dictionary of the English Language* (Springfield, Mass., 1869):

> WANTONLY, *adv.*
> 1. In a wanton manner; without regularity or restraint; loosely; sportively; gayly; playfully; lasciviously.
> 2. Unintentionally; accidentally. [*Obs.*] *Dee.*[376]
>
> WANTON . . . , *a.* . . .
> 1. Moving or flying loosely; playing in the wind; hence, wandering or roving in gayety or sport; sportive; frolicsome. "Note a wild and *wanton* herd." *Shak.*
> She, as a vail, down to the slender waist,
> Her unadorned, golden tresses wore
> Disheveled, but in *wanton* ringlets waved. *Milton.*
> 2. Running to excess; loose; unrestrained.
> How does your tongue grow *wanton* in her praise! *Addison.*
> 3. Luxuriant; overgrown. "In woods and *wanton* wilderness." *Spenser.*
> What we by day lop overgrown,
> One night or two with *wanton* growth derides,
> Tending to wild. *Milton.*
> 4. Not regular; not turned or formed with regularity. "The quaint mazes in the *wanton* green." *Milton.*
> 5. Wandering from moral rectitude; licentious; dissolute; indulging in sensuality without restraint.
> "Men grown *wanton* by prosperity" *Roscommon.*
> My plenteous joys,
> *Wanton* in fullness. *Shak.*
> 6. Especially, deviating from the rules of chastity; lewd; lustful; lascivious; libidinous.
> Thou art froward by nature, enemy to peace,
> Lascivious, *wanton.* *Shak.*
> Syn.—sportive; frolicsome; airy; skittish; frisky; coltish; lecherous; lascivious; libidinous.[377]
>
> LEWDLY . . . , *adv.*
> 1. In an unlearned or foolish manner; ignorantly. [*Obs.*]
> 2. Wickedly; wantonly.
> 3. With the unlawful indulgence of lust; lustfully.[378]

376. Webster (1869), *supra* note 241, at 1490.
377. *Id.*
378. *Id.* at 768.

LEWD . . . , *a*. . . .

1. Not clerical; pertaining to, or characterizing, the laity; laic; laical; hence, unlearned; ignorant; foolish; simple. [*Obs.*]

Yea, blessed be always a *lewed* man
That naught but only his beleve can. *Chaucer.*

The almightiness of God standeth not in that he is able to do all that our foolish, *lewd* thoughts may imagine. *Tyndale.*

2. Contemptible; vile; despicable; profligate; dissolute. [*Rare.*]

But the Jews, who believed not, . . . took unto them certain *lewd* fellows of the baser sort, . . . and assaulted the house of Jason. *Acts* xvii.5.

Great numbers of men were trained up in an idle and dissolute way of life, . . . and then, if not ashamed to beg, too *lewd* to work, and ready for any kind of mischief. *Southey.*

3. Given to the unlawful indulgence of lust; dissolute; lustful; filthy.

4. Proceeding from unlawful lust; as, *lewd* actions.

Syn.—Lustful; libidinous; licentious; profligate; dissolute; sensual; unchaste; impure; lascivious; lecherous.[379]

WICKEDLY, *adv.*

In a wicked manner; with motives and designs contrary to the divine law; viciously; corruptly; immorally.

I have sinned, and I have done *wickedly*. 2 *Sam.* xxiv.17.[380]

WICKED . . . *a*. . . .

1. Evil in principle or practice; deviating from morality; contrary to the moral law; addicted to vice; sinful; immoral;— said of persons and things; as, a *wicked* king; a *wicked* woman; a *wicked* deed; *wicked* designs.

Hence then, and evil go with thee along,
Thy offspring, to the place of evil, hell,
Thou and thy *wicked* crew. *Milton.*

Never, never, *wicked* man was wise. *Pope.*

2. Cursed; baneful; pernicious; as, *wicked* words, words pernicious in their effects. [*Obs.*]

Wicked dew. *Shak.*

3. Ludicrously mischievious, or disposed to mischief. [*Colloq.*]

Pen. looked uncommonly *wicked*. *Thackeray.*

. . .

Syn.—Iniquitous; sinful; criminal; guilty; immoral; unjust; unrighteous; unholy; irreligious; ungodly; profane; vicious; pernicious; atrocious;

379. *Id.*
380. *Id.* at 1513.

nefarious; heinous; flagrant; profligate; flagitious; abandoned. See iniquitous.[381]

381. *Id.*